QUARTERLY REPORT

OF THE

ATTORNEY GENERAL

OF

ALABAMA

For the Period

July 1, 1950

Through September 30, 1950

Volume 60

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from July 1, 1950, through September 30, 1950.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,

Attorney General.

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL

Published by
WALKER PRINTING COMPANY
Printers and Stationers
Montgomery, Ala.

OPINIONS

July 11, 1950.

Hon. D. W. Crosland,
Tax Assessor,
Montgomery County,
Montgomery, Alabama.

Merit System—Montgomery County—Tax Assessors.

1. Act No. 528, General and Local Acts 1949, page 819, approved September 2, 1949, creating and establishing a county wide personnel system in Montgomery County and the City of Montgomery, supersedes all former provisions of law with reference to the employment and compensation of county and city officers and employees included therein and not exempted therefrom.

2. Pay plan established by Personnel Board under Act No. 528, supra, applies to certain employees in office of Tax Assessor of Montgomery County authorized by Act No. 371, General and Local Acts 1949, page 544, approved August 9, 1949.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of June 28, 1950, is as follows:

"Act No. 371, page 544, Acts of Alabama, Regular Session 1949, provides for the hiring of six clerks for the Tax Assessor's Office of Montgomery County. This act also sets the salary for these clerks.

"Act No. 528, page 819 of said acts establishes a county-wide personnel system for Montgomery County. Four of the clerks in the Assessor's Office come under the provisions of this act. Section 2, sub-section (f) provides for the establishing of a pay plan for employees of the classified service. A pay plan has been set up by the Personnel Board and is to take effect July 1st, 1950.

"Does the pay plan as established by the Personnel Board apply to the four clerks working in the Tax Assessor's Office?"

I am of the opinion that your inquiry should be answered in the affirmative.

Section 1 of Act No. 371, General and Local Acts of 1949, page 544, approved August 9, 1949, provides as follows:

Section 1. That the tax assessor of Montgomery County, Alabama, shall be paid an annual salary, which shall be paid to and received by him in lieu of all other compensations, fees or emoluments, as fol-

lows: The tax assessor shall receive an annual salary of four thousand dollars, net, except as hereinotherwise provided, and an allowance of fourteen thousand seven hundred dollars per annum for office help as follows: one clerk at three thousand six hundred dollars per annum, and five clerks at twenty-two hundred twenty dollars per annum, and one thousand dollars per annum for other expenses and ex-officio services of the said tax assessor. The said one thousand dollars to be paid to the tax assessor in monthly installments."

Act No. 528, General and Local Acts 1949, page 819, approved September 2, 1949, created and established a county wide personnel system for all counties of the State of Alabama having a population of not less than 100,000 people and not more than 140,000 people (which embraces Montgomery County) and for municipalities in such counties having a population of 5,000 or more people (which embraces the City of Montgomery), all according to the last or any subsequent Federal Census."

Attention is invited to the following provisions of Act No. 528, supra, which pertain to your inquiry:

"Section 2. The members of the Board shall elect one of their number chairman. The Board shall determine the order of business for the conduct of its meetings and shall meet on the call of the chairman or two of the members. Two members of the Board shall constitute a quorum for the transaction of business. The functions of the Board shall be:

"* * * * *

"(f) To establish, after consultation with the governing body of the county and the governing body of municipalities and the elective officials of the county, coming within the provisions of this act, a pay plan for all employees in the classified service. Such pay plan shall include, for each class of positions, a minimum and a maximum rate or rates as may otherwise in specific instances be fixed by law and such intermediate rates as may be deemed necessary or advisable by the personnel board.

"* * * * *

"Section 4. The provisions of this Act shall apply to all officers and employees in the service of the county and affected municipalities, except:

"* * * * *

"(h) One private secretary or executive assistant of a member of the governing board of such municipality, the bailiff appointed by each judge of the circuit court, and two clerks to be designated by each county elective official and also the Register of the Circuit Court except the member of the Board of Revenue; and any employee receiving his compensation from any elected official of the county.

"Offices, positions and employments not exempted above shall constitute the competitive or classified service of the county and affected municipalities. It is intended hereby to include within the

competitive or classified service all offices, positions and employments in each such county and any such municipalities therein as these offices, positions and employment now exist, or as they may hereafter exist, the holders of which are paid, whether by salaries, wages and fees, in whole or in part from funds of any such county or municipality, or from any elected official and perform duties pertaining to the office of such elected official or officer except those hereinabove enumerated in this Section. . . . .

"* * * * *

"Section 19. All laws or parts of laws general, local or special, which conflict with this Act are repealed.

"* * * * *"

A careful consideration of Act No. 528, supra, as a whole and with particular reference to the above quoted portions thereof, leads to the conclusion that this act supersedes all former provisions of law with reference to the employment and compensation of county and city officers and employees included therein and not exempted therefrom.—Cf. Quarterly Report of Attorney General, Volume 19, page 187.

The question then presents itself as to whether the provisions of Act No. 371, supra, above quoted, fixing a definite compensation for the clerks in the office of Tax Assessor (two of which are specifically exempt from the provisions of Act No. 528, supra, by Section 4(h) thereof) come within the purview of the following proviso of Section 2(f) of Act No. 528, supra.

". . . Such pay plan shall include, for each class of positions, a minimum and a maximum rate or rates as may otherwise in specific instances be fixed by law and such intermediate rates as may be deemed necessary or advisable by the personnel board."

In my opinion, this query should be answered in the negative. The proviso under consideration includes only former provisions of law fixing a definite minimum and maximum compensation. It does not apply to a definite fixed compensation, nor to a maximum ceiling compensation without a minimum specification.

In view of the foreging, it is my opinion that the pay plan established by the Personnel Board applies to four of the six clerks provided for in Act No. 371, supra, (two of the six being specifically exempted from the operation of Act No. 528, supra), and governs over the fixed statutory compensation.

The principles of law enunciated herein are applicable equally to other provisions of law relative to officers and employees of Montgomery County, which fall within the purview of the expressions in this opinion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 12, 1950.

Honorable Roy E. Blair,
Commissioner of Revenue,
State of Alabama,
Montgomery, Alabama.

Gasoline Tax—Refund—Tractor Gasoline.

Act No. 323, approved August 2, 1949, General Acts Regular Session 1949, page 469.

Refunds of gasoline tax cannot be secured on gasoline used in farm tractors unless such gasoline is purchased and used by the claimant after the issuance to him of a user's permit by the Commissioner of Revenue.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion, bearing date of April 25, 1950, is as follows:

"Your official opinion is requested in connection with the administration of Act No. 323, 1949 Acts, page 469, commonly termed the Tractor Gas Refund bill.

"A tractor owner registered his tractor for the first time on February 6, 1950. Proper tractor registration certificate and an application for permit were forwarded to the Revenue Department and were received February 8, 1950. Gasoline allotment was computed and a permit for the then current period (February 1, to August 1, 1950) was issued by this office under date of February 6, 1950.

"On april 18th the permit holder executed a claim for refund, which was received in this office on April 19th with properly executed state approved invoices attached. The claim as well as the individual invoices attached, showed eight purchases of gasoline on various date beginning October 13, 1949, and through January 26, 1950. All were in lots of 50 gallons or more, the total being 425 gallons. Note was made of the fact that the date of the first invoice, October 13, 1949, was more than six months earlier than the date the claim was executed, and also more than six months earlier than the claim was received by this office.

"All other invoices were within a period of less than six months from date of either execution of or receipt of said claim.

"In the light of the above facts, your official opinion is respectfully requested as to the following:

(1) Is gasoline purchased prior to the period covered by a gasoline users refund permit subject to the refund?

(2) Can a gasoline refund users permit be issued by the Commissioner, after February 1st of a year, to cover preceding six month period, where such issuance is based on an application received after February 1st?

(3) Can a refund be made on gasoline purchased prior to the time an applicant first registered his tractor with his local tax assessor?

(4) Can a refund be made on gasoline purchased after registration of a tractor, but before the date of permit issuance?

(5) What is the proper date to be shown as issuance date of permit—(a) date tractor was first registered with assessor or (b) date application therefor was received by the Commissioner or (c) date permit was actually prepared?

"Reference is made to Section 7 of the Act. Is the date a refund claim is actually **received** by the Commissioner to be considered as the date it was 'filed'?

"Is the date a claim was executed, as shown by the jurist thereon, considered as the date 'filed'?

"Is the **Postmark** on the envelope in which a claim is mailed considered as the date 'filed'?"

In answer to your inquiry of April 25, 1950, it is my opinion that several of your specific inquiries are properly the subject of rules and regulations issued by the Commissioner, as authorized by Section 8 of Act No. 323, approved August 2, 1949, General Acts Regular Session 1949, page 469.

However, if you desire an opinion from this office on such matters, I will render an official interpretation of the Act.

It is my opinion that refunds under said Act cannot be secured on gasoline unless such gasoline is purchased and used by the claimant after the issuance to him of a user's permit by the Commissioner of Revenue. Gasoline purchased prior to the issuance of such user's permit cannot be the subject of a refund.

The issuance of a user's permit for a six months period must be made by the Commissioner prior to the commencement of such six months period. A user's permit which is issued during a six months period for such current period is effective only for the unexpired portion of the six months period.

You will note that the six months periods authorized in the Act for user's permits are from February 1 to August 1, and from August 1 to February 1. Section 5.

My interpretations heretofore given are based upon the language of Section 4 which provides: "a person who desires to use refund gasoline shall register the tractor with the tax assessor * * *." Such person is then required to apply to the Commissioner of Revenue for a user's permit, which application shall contain a description of the acreage "to be tended by such tractor."

It is further provided in Section 6 that the application to the Commissioner of Revenue for a user's permit must be accompanied by the registration certificate that the applicant received from the tax assessor. Section 6 provides: "that after the Commissioner of Revenue has received the application for a user's permit, he shall determine the amount of gasoline that will be needed during the ensuing period." Section 5 provides that the user's permit shall contain a statement of the number of gallons "allowed for the operation of each tractor covered thereby."

Section 5 also states that no person is entitled to a refund unless he holds a registration certificate from the tax assessor and a user's permit from the Commissioner of Revenue.

All of these provisions seem to contemplate that only such gasoline as is purchased and consumed after the claimant for refund has received a user's permit from the Commissioner of Revenue is subject to a refund under the Act.

You will note that one limitation on all refund payments is that the claim therefor shall have been filed with the Commissioner of Revenue within six months from the date of purchase of the gasoline with respect to which the claim is made. Section 7.

Your numbered questions are answered as follows:

(1) No.
(2) No.
(3) No.
(4) No.
(5) (c) The date the permit was actually issued.

In answer to your unnumbered question, it is my opinion that the date a refund claim is actually received by the Commissioner of Revenue is to be considered the date it is "filed" within the meaning of the Act. **McDowell v. Henry**, 238 Ala. 663, 193 So. 108.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 14, 1950.

Honorable James E. Folsom,
Governor of Alabama,
CAPITOL.

Appropriations—Legislature—Funds—Salaries — Comptroller —Constitution of Alabama 1901.

1. Amendment LVII to the Constitution of Alabama 1901 provides a continuing appropriation for the salaries of the State legislators.

2. Sections 18, 19, 20, 25 and 26 of Title 32, Code of Alabama 1940 as amended, and Act No. 380 General Acts 1949, page 557, provide continuing appropriations for the salaries of clerks, assistant clerks, secretaries, etc., of the legislature.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of July 12, 1950, is as follows:

"Under Constitutional Amendment LVII, effective at the beginning of the term of the members of Legislature elected at the general election, 1946, fixes the salary or per diem of the members of the Legislature at $10.00 per day, as shown in Cumulative Pocket Parts, Page 65, Volume 1, and Title 32 of the Code of Alabama 1940, as amended, which amendments are shown in the 1949 Cumulative Pocket Parts at pages 20, 21, 22, and 23, Volume 6, fixing the salary or perdiem of the clerks, assistants, etc. of the Legislature.

"You are respectfully requested to render your opinion as to whether the constitutional amendment referred to fixing the salary or per diem of the members of the Legislature carries with it an appropriation to pay such salary or per diem from time to time, as provided by Section 72 of the Constitution and also as to whether the provisions of Title 32, the Code of Alabama 1940, as amended, which amendments are shown in 1949 Cumulative Pocket Parts, Volume 6, at pages 20, 21, 22, and 23, fixing the salary or per diem of the clerks, assistants, etc. carries with it an appropriation to pay such clerks, assistants, etc. from time to time.

"Does the act of the Legislature and constitutional amendment referred to above bring the payment of the members of the Legislature their salary or per diem and the payment of the salary or per diem of the clerks, assistants, etc. within the influence of Section 72 of the Constitution of 1901 and authorize the Comptroller to draw his warrants against any money in the General Fund to pay such salary or per diem of such members of the Legislature, the clerks, assistants, etc. employed therein without a special appropriation therefor?"

It is my opinion that Amendment LVII to the Constitution of Alabama 1901 and Sections 18, 19, 20, 25, and 26 of Title 32, Code of Alabama 1940, as amended, and Act No. 380, General Acts 1949, page 557, satisfy the language of Section 72, Constitution of Alabama 1901 in that the salaries allowed in those constitutional and statutory provisions are "appropriations made by law." Consequently, the Comptroller is authorized to draw his warrants against the General Fund to pay such sums despite the lack of any further appropriation by the Legislature.

Section 72, Constitution of Alabama 1901, provides, inter alia, that:

> "No money shall be paid out of the treasury except upon appropriations made by law . . ."

Amendment LVII to the Constitution of Alabama 1901, provides in pertinent part, as follows:

> "The pay of the members of the Legislature shall be ten dollars per day . . . "

While the precise question of whether Amendment LVII is within the intendment of the words "appropriations made by law" of Section 72 has never been directly passed upon by the courts of this State, the great weight of authority nationally supports an affirmative answer. **Windes v. Frohmiller,** 38 Ariz. 557, 3 Pac. 2d. 275; **People ex rel. Hegmer v. Goodykoontz,** 22 Colo. 507, 45 Pac. 414; **Reed v. Huston,** 24 Idaho 26, 132 Pac. 109, **Rich v. Huston,** 24 Idaho 34, 132 Pac. 112; **Thomas v. Owens,** 4 Md. 189; **State ex rel. Ratwitt v. Hickman,** 9 Mont. 370, 23 Pac. 740; **State ex rel. Buck v. Hickman,** 10 Mont. 497, 26 Pac. 386; **State ex rel. Roberts v.** Weston, 4 Neb. 216; **Weston v. Herdman,** 64 Neb. 24, 89 N. W. 384; **State ex rel. Fornoff v. Sargent,** 18 N. M. 272, 136 Pac. 272; **Riley v. Carter,** 25 Pac. 2d. 666, 88 A. L. R. 1018; **Lightfoot v. Lane,** 104 Tex. 447, 140 S. W. 89; **State ex rel. Henderson v. Burdwick,** 4 Wyo. 272, 33 Pac. 125, 24 L. R. A. 266. Moreover, in **Reynolds v. Taylor,** 43 Ala. 420, 424, the Supreme Court quoted with approval the following headnote from **Thomas v. Owens,** supra, the leading case on this subject, "The constitution proprio vigore makes the appropriation for the salaries fixed in it, by declaring the amount 'shall' be 'received' by the particular officer; this is an appropriation **by law,** by the **supreme law** of the State, and no legislative act making appropriations for such salaries is necessary."

In 88 A. L. R. 1054, there appears the following language concerning the Thomas case, supra, "The logic of the opinion has received such universal approval that an extensive quotation seems justified. The Court said: '. . . . It (meaning the provision of the Constitution that no money shall be disbursed without an appropriation) was obviously inserted to prevent the expenditure of the people's treasure without their consent, either as expressed by themselves in the organic law, or by their representatives in constitutional acts of legislation . . . These being the purposes and objects of the clause, the question is: Have the people given their consent to the payment of the salary of the comptroller? That they have done so is palpably manifest. They have said he "shall receive an annual

salary of $2,500." They have not merely said he may claim such a sum, but, emphatically, that he "shall receive" it. It is impossible for human language to be less ambiguous or more positive. The people, in their organic law,—which is paramount to all other law,—have not only given their consent, but they have imperatively issued their commands, that the particular officer "shall receive" it . . . An opposite interpretation would countenance this paradox, that a co-ordinate branch of the government could stop its whole machinery, by refusing to pay the salaries of those upon whom is devolved the discharge of the duties of the other branches; and this, too, when the Constitution expressly declares that these officers "shall receive" their salaries, and that they "shall not be diminished." " . . . "

Sections 18, 19, 20, 25 and 26 of Title 32, Code of Alabama 1940, as amended, and Act No. 380, General Acts 1949, page 557 authorize payments of salaries to employees, secretaries, clerks, doorkeepers, sergeants-at-arms, subordinate employees, etc. That these sections effect "appropriations made by law" and are within the constitutional mandate is settled doctrine in Alabama. As early as 1833 the Supreme Court stated the proposition that, "It is conceded that no money can be drawn from the treasury, but in pursuance of an appropriation made by law, but it is not necessary, that there should be an act passed annually, for the appropriation: if there is a general law, fixing the salary, requiring it to be paid at the treasury, . . . this is sufficient." **Nichols v. Comptroller,** 4 Stewart and Porter 154, 157. The issue was raised again in 1869 in **Reynolds v. Taylor,** 43 Ala. 420, where the court declared, ". . . this question has long been settled in this State. In the case of Nichols v. Comptroller . . . the point arose and was decided. This has been the law of the State for now over thirty-five years, and has been a guide to the comptroller for that great period of time." In 1879, in **Riggs v. Brewer,** 64 Ala. 282, there appears this language, "The salary being thus fixed by a general statute, permanent in its nature, no special appropriation by the General Assembly was necessary, to entitle him (the marshal and librarian of the Supreme Court) to demand payment of it, nor to authorize the auditor to draw a warrant on the treasurer for its payment. The statute, of itself, operated as an appropriation, and satisfied the constitutional requirement that money shall be drawn from the treasury only upon appropriations made by law." (At page 284.)

Finally, as recently as 1939, in **In Re Opinion of the Justices,** 237 Ala. 377, 186 So. 731, the Supreme Court declared: "It is the law that an act which creates an office and fixes a definite salary by law carries an appropriation to pay the salary from time to time."

From the foregoing, it is established that Amendment LVII and Sections 18, 19, 20, 25, 26 and Act No. 380, supra, all provide continuing appropriations for the salaries in question thus satisfying the constitutional requisites of Section 72.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 18, 1950.

Hon. William W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama

Taxation—Filing Tax.

Instrument setting forth financing plan which entails incurring an indebtedness and the issuance of bonds is not subject to a mortgage filing tax upon recordation since no real or personal propery or interest therein is conveyed by said instrument.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of April 4, 1950, is as follows:

"There has been submitted to this office for recording an instrument in which the Morningview Baptist Church is to be financed to the extent of $80,000.00 for the construction of a house of worship.

"It is the opinion of this office that there is a mortgage tax due amounting to $120.00, but the attorneys filing the paper and also the local attorney, Mr. R. L. Farnell, take a different viewpoint. They claim that under this certain plan that there is no mortgage tax due.

"We are enclosing herewith a photostatic copy of the instrument and also a photostatic copy of Mr. Farnell's letter.

"We will appreciate very much if you would give us a ruling promptly upon this matter as the Church is anxious to go ahead with its plans."

A mortgage filing tax is not payable upon the recordation of the instrument about which you have inquired.

Your situation is controlled by Quarterly Report of Attorney General, Vol. 53, page 38. There, as here, the instrument recorded—an agreement whereby indebtedness was incurred and was to be repaid through a bonding arrangement—conveyed no interest in real or personal property situated within the State of Alabama. That opinion held, therefore, that the instrument did not come within the provisions of Title 51, Section 619, Code of Alabama 1940. The instant instrument does not appear to convey any interest in real or personal property. The obvious purpose of the instrument is to provide for a method of finance which gives the lender the substantial protection afforded a mortgagee, but which avoids certain

burdens which a mortgage transaction would entail. One of those burdens is, of course, the payment of a mortgage filing tax upon recordation. Such instrument should be viewed with careful scrutiny, but it is difficult to see how the instant instrument can be held to convey any interest in property. Section X of the attached resolution sets out the rights of the bondholders in case of default in payment. The bond itself provides that there shall be no further mortgage or encumbrance while the bonds are outstanding. All this comes close to conveyance of property interest, but is not quite such a conveyance.

As stated, the opinion of this office in Volume 53, page 38, is controlling herein. A mortgage filing tax is not due.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 18, 1950.

Hon. O. Howard Moore,
Tax Assessor,
Madison County,
Huntsville, Alabama.

Madison County—Five-Mill Special School Tax.

The five-mill special school tax authorized to be levied by Madison County for the City of Huntsville, under the constitutional amendment proposed by Act No. 474, General Acts 1949, page 691, should be calculated separately and not included with the regular city twelve-mill tax.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 17, 1950, is as follows:

"Act No. 474 of the 1949 Acts, granted to the city of Huntsville the right to vote for a special 5 Mill District School Tax.

"Election was had in due time and the vote was in favor of the Tax.

"My question, for your opinion, is whether this five Mill Tax shall be calculated separately, or can it be included with a three Mill Tax which we already have, which is also a special District School Tax for City of Huntsville."

In adition to your request hereinabove set out, I have your supplemental letter of April 7 in which you ask may the five-mill district school

tax, authorized to be levied under the constitutional amendment proposed by Act No. 474, General Acts 1949, page 961, be included with the regular City of Huntsville tax, which said latter tax amounts to 12 mills, thus making a total of 17 mills collectible for the benefit of the City of Huntsville.

In answer to your request, you are advised that it is my opinion that the five-mill district school tax authorized by the constitutional amendment proposed by Act No. 474, supra, should be calculated separately and apart from any other tax levied and collected for the City of Huntsville.

This constitutional amendment specifically provides that the five-mill district school tax thereby authorized to be levied and collected is specifically pledged for the payment of the five hundred seventy-five thousand dollar ($575,000) bond issue authorized under the provisions of the amendment.

It is provided in said constitutional amendment that when this tax is collected by the tax collector of Madison County, it shall be paid to the City of Huntsville, and the City of Huntsville shall in turn use the proceeds of said five-mill district school tax exclusively for the purpose of paying the interest and principal on the bonds authorized to be issued under the amendment.

In addition to the above, your specific attention is directed to Subdivision (C) of Section 1 of said Act No. 474, supra, which reads as follows:

> "(C) If sufficient revenue has been produced by the tax levied in paragraph (A) of this Amendment to pay the principal amount of the bonds issued hereunder with interest thereon prior to the expiration of the period for which the tax was levied, the tax shall immediately cease and shall no longer be collected or enforced, and the bonds shall be redeemed forthwith."

The above-quoted Subsection, in my judgment, is a clear indication on the part of the Legislature that this five-mill district school tax should be calculated separately and apart from any other tax levied for the benefit of the City of Huntsville, so that the taxing authorities may cease collecting this tax when the proceeds thereof have brought in sufficient funds to pay off the principal and interest of the bonds issued under the constitutional amendment. If this tax were calculated along with the other taxes due the City of Huntsville, the provisions of Subsection (C), quoted hereinabove, could not be compiled with; for it would be impossi-

ble to determine when this five-mill tax had produced a sufficient amount of money to retire the principal and interest on the bond issue of five hundred seventy-five thousand dollars ($575,000).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 19, 1950.

Hon. D. R. Wade,
Director of Labor,
State of Alabama,
CAPITOL.

Constitutionality—Labor—Wilcox County.

Act No. 241, General Acts 1949, page 347, is unconstitutional because it gives executive and administrative powers to circuit courts in violation of Sections 42 and 43 of the Constitution of Alabama 1901; and because it gives original jurisdiction to the Alabama Supreme Court in violation of Section 140 of the Alabama Constitution of 1901.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of September 21, 1949, is as follows:

"I shall appreciate your opinion on the following questions relative to an act passed by the 1949 Session of the Legislature:

"1. Does Act 241 of the 1949 Legislature violate any provisions of the Constitution of the United States or any provisions of the Constitution of Alabama?

"2. Does this same act of the Alabama Legislature violate any act of the Congress of the United States?

"Your early attention to these questions will be greatly appreciated."

I am of the opinion that Act No. 241, General Acts 1949, page 347, is violative of the Constitution of Alabama 1901, Sections 42, 43 and 140.

This act copies Title 1 of the Act of June 23, 1947, Public Law 101, 80th Congress, commonly known as the Taft-Hartley Act, but for those changes necessary for its operation on a State and County level. The

federal administrative agency is the National Labor Relations Board, here, the Circuit Judge of the Fourth Judicial Circuit is administrator.

In Section 2, the Circuit Judge is empowered to make such rules and regulations as are necessary to effectuate the purposes of the statute. The right of employees to self-organization and to bargain collectively through representatives of their own choosing is enunciated in Section 3. Section 4 defines unfair labor practices while Section 5 sets up rules as to representation and elections held by the Circuit Judge. Elections are to be held after an investigation and hearing conducted by the Judge and there is provision for an appeal from his administrative decision to the Supreme Court of Alabama. Section 6 authorizes the Judge to prevent unfair labor practices by his order but denies him enforcement power. Also, he is permitted to cede his jurisdiction to other state agencies. He must petition the Supreme Court for enforcement of orders made pursuant to Section 6 (c). If he believes temporary injunctive relief necessary he must petition the court, since he is powerless to grant this or any other relief. Section 7 grants the Judge broad investigatory powers including that of issuing subpoenas but, again, enforcement is to be had only from the Supreme Court. Penalties for interference with the Judge's performance of his duties are provided in Section 8. Section 9 guarantees the right to strike, while Section 10 gives supervisors the right to join a union. Section 14 conditions the Act's effectiveness, on its approval by a majority of the voters of Wilcox County.

The Act conflicts with the Constitution of Alabama 1901. The provisions of the statute outlined, supra, establish the Circuit Judge as an administrative officer. He is stripped of his judicial functions. In addition, he acts as a prosecutor of violations of the Act before the Supreme Court of Alabama. Because these ministerial functions have been conferred on the judiciary, the Act contravenes Section 42 of the Constitution of Alabama 1901 (separation of powers).

The Act also violates Section 43 of the Alabama Constitution:

> "In the government of this State . . . the judicial (department) shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

The severability clause (Section 11) cannot save the statute. The provisions objected to here are prerequisite to the Act's operation. The Act is meaningless without these provisions.

Finally, Act No. 241, violates Article 6, Section 140, Constitution of Alabama 1901. This Section provides that the Supreme Court shall have only appellate jurisdiction except in certain instances not relevant here. The instant act requires the Circuit Judge to press for enforcement of

his orders before the Supreme Court of Alabama. Thus, the Act gives the Supreme Court of Alabama original jurisdiction.

In view of the constitutional prohibitions discussed above, the Act cannot stand.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 19, 1950.

Hon. N. L. (Buck) Roberts,
Tax Assessor,
Chilton County,
Clanton, Alabama.

Commissions—Tax Assessors—Tax Collectors—Taxation.

Tax assessor's commissions shall be paid only from taxes actually collected and tax collector may be held accountable in his settlement for payment of commission to assessor for taxes assessed but not collected.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of June 24, 1950, is as follows:

"Prior to October 1, 1949, I delivered to the Tax Collector, of Chilton County, the Tax abstract for 1949. This abstract of course included the Public Utilities.

"On Oct. 18, 1949, the Tax Collector paid to me my commissions based on figures as shown in above mentioned abstract.

"Now, no objections had been filed and no litigation was pending against any assessment included in the said 1949 abstract at the time the Tax Collector paid to me my commissions. However, some time after the Tax Collector paid to me my commissions for 1949, some or all of the Public Utilities appealed their assessments, and litigation is now pending the Courts. The Utilities have paid only a portion of their 1949 tax bills.

"The Tax Collector has requested me to refund him about $1300 due to the fact that the Public Utilities have not paid their full 1949 taxes as set out in above mentioned abstract.

"Can the State Comptroller or any other agency of the State demand a refund from the Tax Collector, at the time of his settlement (final or otherwise) any part of the above commission so paid to me.

"Your official opinion in this matter will be highly appreciated."

The tax collector may be held accountable to the comptroller for the payment of commissions to the tax assessor, which commissions have been based on taxes assessed but not collected. This settlement and accounting is pursuant to Title 51, Section 232, Code of Alabama 1940.

Tax assessors are entitled to commissions as provided in Title 51, Section 30, Code of Alabama 1940. However, these commissions are payable out of tax monies collected. The commissions are computable on taxes actually collected, and not on the basis of abstracts of assessments where such assessments are still uncollected. **Crow v. Board of School Commissioners**, 228 Ala. 107, 152 So. 26. See also, Biennial Report of Attorney General 1936-38, page 395.

Where the payment of commissions has not been made according to law, the tax assessor and the tax collector and their official bondsmen are liable for the illegal collection of commissions. Quarterly Report of Attorney General, Volume 17, page 280.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 24, 1950.

Hon. Knox McRae,
Director of Finance,
State of Alabama,
Montgomery, Alabama.

Finance, Department of—Funds—Insurance—Municipalities.

The surplus in the State Insurance Fund legally may be invested in bonds of Alabama municipalities pursuant to the provisions of Title 28, Section 323, Code of Alabama 1940, as amended by Act No. 675, General Acts 1949, page 1045.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of May 31, 1950 is as follows:

"The State Insurance Fund since its inception has built up a surplus exceeding a million dollars. This has been accomplished in part

by an investment of the surplus pursuant to the provisions of Title 28, Section 323 (amended by Act No. 675, 1949 Legislature). The earnings on investments go into the Fund, of course.

"The investments have been in State and Federal Bonds as was required prior to the amendment to Section 323 by the 1949 Legislature. The amendment provides '. . . or of any agency, institution or instrumentality of the State of Alabama.'

"The yield on some of our municipal issues is considerably greater than the Federal or State issues and it would be more expedient for the Fund to invest in these high yields. The Legislature took cognizance of this fact when they amended the statute to include investments other than direct obligations of the United States or the State of Alabama.

"Please render your official opinion as to whether or not the language, '. . . or of any agency, institution or instrumentality of the of the State of Alabama' includes municipalities for the purpose of making the investment as provided in said Section 323.

"It is my information that such language clearly was intended to and does include municipal issues, and your attention is respectfully invited to those cases holding that a municipal corporation is an instrumentality of the State (Carey v. City of Haleyville, 230 Ala. 401, State v. Gullatt, 210 Ala. 452).

"I trust that you will give this matter your customary prompt attention as the Instrument Fund can make investments now which will provide a much larger earning."

I am of the opinion that your question must be answered in the affirmative.

Title 28, Section 323, Code of Alabama 1940, as amended by Section 6 of Act No. 675, General Acts 1949, page 1045, reads as follows:

"All premiums and earnings collected under the provisions of this article shall constitute a trust fund to be applied as herein authorized. With the approval of the governor, any surplus in the fund over a necessary working capital, which shall be determined by the director of finance, at not less than four hundred thousand dollars, may be invested in the bonds or other obligations of the United States, of the State of Alabama, or of any agency, institution, or instrumentality of the State of Alabama. Any and all funds derived from operations under this article shall be subject to requisition by the director of finance, approved by the governor, for the payment of losses, necessary expenses of administering this article and investment."

Prior to its 1949 amendment, Section 323, supra, restricted the investment of the surplus accumulated in the State Insurance Fund to investment in bonds of the United States and bonds of the State of Alabama. The 1949 amendment enlarged the investment filed by authorizing the investment of such funds in bonds "of any agency, institution, or instrumentality of the State of Alabama." Therefore, your inquiry presents the question whether municipal bonds issued by Alabama municipalities are bonds of an agency, institution, or instrumentality of the State of Alabama.

Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government, and their powers are such as the Legislature may confer, and which may be enlarged or withdrawn at its pleasure. **Carter v. Town of Muscle Shoals,** 242 Ala. 519, 7 So. 2d 74; **Carey v. City of Haleyville et al,** 230 Ala. 401, 161 So. 496; **State ex rel. Brooks v. Gullatt,** 210 Ala. 452, 98 So. 373; **Town of Graysville v. Johnson,** 33 Ala. App. 479, 34 So. 2d 708.

Since municipalities are instrumentalities of the State, I am of the opinion that, for the purpose of investing the funds in question, municipal bonds issued by muinicipalities of this State are bonds of an "agency, institution, or instrumentality of the State of Alabama," within the meaning of Section 323, supra, as amended.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 24, 1950.

Hon. Eris F. Paul,
Circuit Solicitor,
12th Judicial Circuit, Coffee County,
Elba, Alabama.

Gaming and Lotteries.

A scheme, or plan, whereby persons have their names placed in a container from which one name is drawn once a week and announced over a public address system at a theatre, the person whose name is drawn being awarded a prize upon his answering a question asked him at that time, is violative of Section 65, Constitution of Alabama 1901, and Title 14, Section 275, Code of Alabama 1940, as constituting a lottery, or scheme in the nature of a lottery.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of June 9, is as follows:

"Will you please give me an opinion as to the validity of the following plan:

"A theatre registers the names of persons on cards which are later placed together in a container. Once each week one name is drawn from the container and the person's name is announced over a public address system ('Loud Speaker') at the theatre. The theatre is a drive in at the edge of town but near a residential area and across the street from a retail business establishment. If the person whose name is drawn and announced comes immediately into the theatre he is asked a question. If he correctly answers the question he is awarded a prize. If the person whose name is drawn is not present or does not come in when his name is announced, or if he is present and does not correctly answer the question, the cash prize goes over to the next week and is increased.

"I am advised that under the plan, it is not necessary to purchase a ticket in order to register, nor is it necessary to purchase a ticket or pay admission to enter the theatre if one's name is drawn and announced. If he is near enough to the establishment to hear his name announced, is he permitted to enter the theatre without charge for the purpose of answering the question.

"Does the plan outlined herein constitute a lottery, or scheme in the nature of a lottery, or violate any other law of the State of Alabama?"

"Lotteries or devices of like kind, or any gift enterprises, or any schemes in the nature of a lottery or gift enterprise are prohibited both by the Constitution itself and by the statutory law of this State. See Section 65, Constitution of Alabama 1901, and Title 14, Section 275, Code of Alabama 1940." Quarterly Report of Attorney General, Vol. 57, page 86.

Many definitions of "lottery" can be found, but most of the cases resolve themselves to a consideration of the three elements necessary to constitute the offense. These elements are: (1) a prize (2) awarded by chance (3) for a consideration. **Minges v. City of Birmingham,** 251 Ala. 65, 36 So. 2d 93; Opinion of the Justices, 249 Ala. 516, 31 So. 2d 753; **Grimes v. State,** 28 Ala. App. 4, 178 So. 89, cert. den. 235 Ala. 192, 178 So. 73; Quarterly Report of Attorney General, Vol. 57, supra; Quarterly Report of Attorney General, Vol. 49, page 30.

The presence of a prize in the instant case is beyond question. The questions to be considered are, therefore, whether or not the elements of "chance" and "consideration" are present.

In my opinion, the Court in the case of **Grimes v. State,** supra, fully answers the question of whether or not consideration is present. In dealing with what is commonly known as "Theater Bank Nights," the Supreme Court stated:

"It should be kept in mind that the penal statute is directed to the operator. Is there a consideration moving to him?

"The very fact that it is a business enterprise intended to swell the receipts from paid admissions to the theater evidences an intention to garner a profit from the gift enterprise * * *.

* * *

"It is not of consequence whether either the operator or the patron has figured just how much of the admission charge is paid for the chance. 'Gift enterprise' in the nature of a lottery definitely covers a lottery in aid of legitimate business, through colorable gifts, but in fact prizes awarded by chance for a price.

* * *

"The results, the success of the plan in swelling the patronage, and consequent income through the scheme of chance are the final proof of a consideration paid and a consideration received. Certainly it cannot be questioned that such is the result intended by the bank night operator. Without it, the bank night would speedily cease to be.

"That the prize may go to some one who has paid nothing does not negative the fact that many have paid for their chance. Because some have not been drawn into the gambling phase does not render it any the less a lottery, with whatever of evil it engenders, as to the large public who have paid."

This, in my opinion, is conclusive of the fact that the element of consideration is here present. See opinion of this office rendered to Hon. Dan Boyd, Circuit Solicitor, Randolph County, under date of April 24, 1950 (Ms.), copy of which is encolsed.

The opinion to Hon. Dan Boyd, supra, seems directly on point with the instant case on the question of whether the element of chance is present. In that opinion, after quoting at length from the Hinges case, supra, it was stated:

"In my opinion, in the practical operation of the scheme here described the dominating or controlling factor in the awarding of the prize offered is chance. As noted, the name or number of the person selected to become a contestant for the prize offered is selected by pure chance, and nothing else. His or her name is drawn at random from a container holding the names of all other patrons of the business establishments. At this stage of the scheme, chance and nothing else is the controlling factor. The mere additional factor of such scheme requiring the person so selected to answer some question or perform certain acts, does not obviate the fact that such person has become a contestant for such prize by sheer chance. In my judgment, it is clear that chance is the dominating or controlling factor permeating the entire scheme so outlined.

"This additional feature of requiring such person, selected by chance, to do or perform certain acts, in my opinion, is nothing more than a subterfuge seeking to bring the scheme without the influence of the Constitution and Statutes. This the law will not tolerate. Johnston v. State, 16 Ala. App. 425, 78 So. 419; In Re Opinions of the

Justices, 225 Ala. 502, 144 So. 111; Quarterly Report of Attorney General, Vol. 49, page 30."

The premises considered, the answer to your question must be in the affirmative. The plans or scheme outlined by you contains all the essenhibited by the Constitution and statutory law of this State.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 24, 1950.

Hon. C. E. McNatt,
Clerk, Law and Equity Court,
Franklin County,
Russellville, Alabama.

Department of Conservation—Game and Fish—Fines.

Fines assessed for hunting during closed season, Title 8, Section 87, Code of Alabama 1940, as amended, should be paid to the Director of Conservation. Title 8, Section 47, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of June 22, 1950, is as follows:

"Two persons have been convicted this week and fined $50.00 each on a charge of killing a wild turkey during the closed season in violation of Title 8, Section 87, Code of Alabama of 1940 as amended by General Acts of the legislature approved September 19, 1949, and published in General Acts of 1949, page 1029. Should I as clerk of the court, pay the fines mentioned here in to the State Department of Conservation or to the Fine and Forfeiture Fund of Franklin County? To whom should I as clerk pay these fines? Please let me have your opinion."

In my opinion, the fines referred to in your injuiry should be remitted to the Director of the Department of Conservation. Title 8, Section 47, Code of Alabama 1940, provides as follows:

§ 47. Jurisdiction of offenses; disposition of fines—Justices of the peace or the inferior criminal courts of the counties of the State of Alabama shall be and are hereby given final jurisdiction to try and convict persons, firms or corporations violating any of the provisions of the game and fish laws, or the rules and regulations promulgated

thereunder; and they shall remit to the director on or before the first day of each month all fines and forfeitures collected by them for the violation of such laws, rules and regulations, as prescribed in the game and fish laws, together with a statement of the name of the person, firm or corporation convicted of such violation, the time of such conviction, the amount of the fine or penalty, the date of the remittance, and the specific charge for which the defendant was tried."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 24, 1950.

Hon. George T. Culps,
Tax Collector,
Madison County,
Huntsville, Alabama.

Tax Collectors—Taxation—Ad valorem Taxes—Tax Sales—Notices.

1. The only notice that the tax collector must give before proceeding to levy upon and sell personal property for the payment of delinquent ad valorem taxes is the notice provided by Title 51, Section 201, Code of Alabama 1940. No personal service of notice on the taxpayer is necessary.

2. The tax collector is the only person authorized by law to levy on and sell personal property for the payment of delinquent ad valorem taxes.

3. There is no statute requiring the recording in any court of "any papers that may be used" in accordance with the sale of personal property for the payment of delinquent ad valorem taxes.

4. No form of execution is necessary in connection with the levy and sale of personal property for the payment of delinquent ad valorem taxes.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of June 9, 1950, is as follows:

"Your interpretation of the Code of 1940, Title 51, Section 201 is desired.

"I have in Madison County a delinquent taxpayer who at this time owns personal property of sufficient value, I believe, as to enable me to collect these taxes, should the property be sold at auction.

"I am of the opinion that the section set out in paragraph one above is the section under which I should proceed. Said section along with other provisions contains the following, viz: 'After the first day of January of each year, the tax collector must proceed, without delay, to levy upon the personal property of delinquent taxpayers for the payment of their taxes, and after having first given ten days notice of the time and place of sale, with a description of the property to be sold, by posting the same at three or more public places in the precinct of the residence of such delinquent, either at the time of assessment or of the levy.'

"The following are questions the answers of which I desire.

"1. In levying upon personal property under this section, what notice, if any, am I required to give said delinquent taxpayer?

"2. Do I, as tax collector of Madison County, personally serve said levy and personally take charge of said property or should the Sheriff take possession of said property?

"3. Should any papers that may be used under said section be filed in any Court?

"4. If I, as tax collector, must personally take possession of said property, please prepare a form for said levy and any notice, if any, that should be served upon the taxpayer at the time of taking said property into my possession.

"A reply within the next ten days will be deeply appreciated."

In answer to your first question, it is my opinion that the only notice you are required to give before a levy and sale of personal property for the payment of delinquent ad valorem taxes is the notice provided for by Title 51, Section 201, Code of Alabama 1940. This is constructive notice to the owner or other person having an interest in the property. No personal service of notice on the property is necessary. See **Longyear v. Toolan,** 209 U. S. 414, 52 L. Ed. 859; **Ballard V. Hunter,** 204 U. S. 241, 51 L. Ed. 461; **Horne v. Ocala,** 143 Fla. 108, 196 So. 441.

Answering your second inquiry, it is my opinion that it is your duty as tax collector to levy on the property. The tax collector is the only person authorized by law to levy on and sell personal property for the payment of delinquent ad valorem taxes. There is no authority of law for the sheriff to levy on and take possession of such property.

In reference to your third inquiry, I do not understand what you mean by "any papers that may be used" under Section 201, supra. If the

property has been properly assessed and the notice required by Section 201 has been given, the tax collector may proceed to sell the property as provided in said section. It is not necessary to have any form of execution in connection with the levy. Cf. Quarterly Report of Attorney General, Volume 19, page 234. There is no statute requiring the recording in any court of the assessment sheet and the notice of sale.

In regard to your fourth inquiry, it will be seen from the answer to your third inquiry that no form of execution is necessary in connection with the levy, and that no notice need be served on the taxpayer. However, for your convenience, there is attached hereto a form of notice that must be given under Section 201, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 24, 1950.

Hon. Phillip J. Hamm,
Director of Conservation,
CAPITOL.

Department of Conservation—Game and Fish—Licenses.

The law which requires a license for packing, canning or processing seafoods includes seafood shops engaging in the business of packing, canning or processing crabs.

Opinion by Assistant Attorney General Harris.

Dear Sir:

The request of your predecessor for an official opinion, bearing date of April 10, 1950, is as follows:

"We have had many inquiries concerning the interpretation of Section 142, Title 8 of the 1940 Code. I quote this section in full as follows:

" 'License for packing, canning or processing seafood—Before any person, firm, corporation or association shall engage in the business of packing, canning or processing oysters, shrimp or other seafood, he or it shall make application to the department of conservation, accompanied by a fee of fifty dollars, and said department shall issue to said applicant a license to engage in the business for which the application is made. Said license shall be dated and shall be effective only for the season issued.'

"The inquiries above referred to come from certain seafood shops, along the Gulf coast, which handled canned crab meat. Employees of

these shops cook or boil the live crabs, pick out the meat and pack it into cans. I should like to have your official opinion as to whether or not such a business, as I have outlined above, would require a license for packing, canning or processing seafood, as required by Section 142, Title 8 of the 1940 Code herein quoted.

"Your usual prompt attention in handling such matters will be deeply appreciated."

I am of the opinion that the seafood shops which boil or cook crabs, and then place the crab meat into cans, are engaging in the business of packing, canning or processing seafoods for which a license is required by Title 8, Section 142, Code of Alabama 1940. Said section reads as follows:

"142. License for packing, canning or processing seafood.—Before any person, firm, corporation or association shall engage in the business of packing, canning or processing oysters, shrimp or other seafood, he or it shall make application to the department of conservation, accompanied by a fee of fifty dollars, and said department shall issue to said applicant a license to engage in the business for which the application is made. Said license shall be dated and shall be effective only for the season issued."

The wording of this section is such that it specifically designates the packing, canning or processing of oysters, shrimp or other seafood. The words "other seafood" would include crabs.

I call your attention to Title 8, Section 111, Code of Alabama 1940, which I quote in part as follows:

"111. Definitions.—As used in this title, the term 'seafoods' shall include and mean all oysters, salt-water fish, salt-water shrimp, diamond back terrapin, sea turtle, crabs and all other species of marine or salt-water animal life existing or living in the water within the territorial jurisdiction of the State of Alabama....."

It is clearly seen that the Legislature intended to designate, and did designate, the crab as a seafood under the interpretation of Alabama statutes. When the Legislature refers to the packing, canning or processing of seafoods, other than the specifically named oysters and shrimp, it would, therefore, clearly include crabs.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 24, 1950.

Hon. T. J. Land, Chairman,
Board of Revenue,
Walker County,
Jasper, Alabama.

Contracts—Counties—Walker County.

Under the provisions of Act No. 232, Local Acts 1935, page 131, all contracts amounting to more than fifty dollars must have the approval of the Walker County Board of Revenue, which approval must be spread upon the minutes of the board. No contract having been made as provided in said act, the Walker County Board of Revenue cannot legally pay a claim for road machinery rental.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of May 12, 1950, is as follows:

"In September 1949, the Joe Money Machinery Co. sent to Walker County a caterpillar Tractor No. 12, **Motor Grader** on a trial basis for a period of one week to ten days. The tractor was sent out on approval of the members of the Walker County Board of Revenue with the intention of purchasing same if it proved satisfactory. No obligation was imposed upon the county to purchase.

"The tractor was used by the County for a period of three weeks at which time the machine broke down and the County declined to purchase. The County used the machine for a period of two weeks longer than the agreed trial period.

"No written contract was entered into between the Joe Money Machinery Co. and the County and the minutes of the Board do not reflect any agreement regarding rental payment.

"The Board has been presented with a bill dated September, 1949, for a three weeks rental in the amount of $450.00.

"Can the County legally pay this account in view of Section 9 of Act No. 232—page 131 of Local Acts of Alabama (1935-)?"

Section 9 of Act No. 232, Local Acts of Alabama 1935, page 131, provides as follows:

"That all purchases, contracts for purchase, contracts for work or labor, and contracts for expenditures of money for or on behalf of the County, must have the approval of the Board before such purchase or

contract is made, and which approval must appear upon the minutes of the Board, provided that in cases of emergency any member may make contract or purchase in amount of not more than fifty dollars without first obtaining approval, but the approval must be later obtained and failing to obtain such approval it shall not constitute an obligation on the County. Such emergency contracts or purchases must be reported by said member in writing and in detail within three days thereafter."

The question presented by your request was considered by this office in an opinion found in Quarterly Report of Attorney General, Vol. 28, page 109. This opinion dealt with purchases made by a county, which purchases were not made in compliance with a local law providing the manner in which supplies were to be purchased. The opinion said, in part:

"In your local act, you have a mandatory provision saying that no purchase shall be made without a requisition, signed by a county official or employee and approved by the Probate Judge. No penalty is provided for failure to comply with this provision in making purchases for the county. Consequently, to hold that purchases made in disregard of this provision are valid claims against the county would be, in fact, a nullification of the objects and purposes for which the act was intended to remedy."

In Act No. 232, supra, definite steps are enumerated for the purchase of supplies or the making of contracts. No penalty is provided for the violation of this act. Therefore, it is my opinion that the provisions of the act are mandatory.

Implied liability cannot attach where the express provisions of statute negative its existence. This is true, even though the county may have received the benefits of the contract which was made in violation of the provisions of a mandatory statute. **Attalla County v. Mississippi Tractor & Implement Company,** 162 Miss. 864, 139 So. 628.

You state in your request that no contract for rental was ever made, and that no obligation was imposed upon the county to purchase the machinery in question.

It is my opinion that the county may not legally pay this claim for rental.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 24, 1950.

Hon. Ed E. Reid,
Executive Director,
The Alabama League of Municipalities,
14 South Hull Street,
Montgomery, Alabama.

Taxes—Hospitals—Counties—Municipalities.

The proceeds of the special county tax authorized by Constitutional Amendment No. LXII, proposed by Act No. 357, General Acts of Alabama 1947, page 241, submitted November 2, 1948, and proclaimed ratified November 15, 1948, may be appropriated, in a sum sufficient to enable a municipality to make an extension of its sewer line to a county hospital.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of June 15, 1950, is as follows:

"The Town of Reform is being called upon to extend its sewer line to the location of a new county hospital. The town does not have the funds with which to make this improvement and it feels that the County Hospital Association would be willing to appropriate funds from the proceeds of a special hospital tax levy to aid the town in making such improvement, if this can be done legally. The Mayor of Reform feels that the extension of this line to the hospital is a necessary part of the hospital project.

"We would like your opinion as to whether or not the Pickens County Hospital Association can appropriate from the proceeds of the hospital tax levy recently voted a sum sufficient to enable the town to make the extension of its sewer line to the hospital."

The proceeds of the special county tax, authorized by Constitutional Amendment No. LXXII, proposed by Act No. 357, General Acts 1947, page 241, submitted November 2, 1948, and proclaimed ratified November 15, 1948, approved by vote of the electors of the county and levied by the governing body according to law, may, under the amendment and the ballot used in the Special County Tax Election of Pickens County on December 13, 1949, be used for "acquiring, by purchase, lease, or otherwise, constructing, operating, equipping, or maintaining county hospitals, or other hospitals, non-profit hospitals, and public health facilities. * * *." Constructing or equipping a county hospital is clearly within the uses contemplated by this amendment. Under this amendment, the proceeds of the tax may be applied to any or all such purposes enumerated. In re Opinion of the Justices, 252 Ala. 194, 41 So. 2d 559.

Your attention is called to the constitutional amendment proposed by Act No. 570, General Acts 1949, page 897, submitted December 13, 1949, proclaimed ratified December 21, 1949, which provides, in part, as follows:

> "If a majority of the qualified electors of any county in the state, except Mobile and Jefferson Counties, who participate in an election held therein pursuant to the provisions of any amendment to the constitution heretofore adopted shall vote at such election in favor of the levy and collection of a special county tax, within the limitations provided in such amendment, for any one or more of the purposes included within the meaning of the term public hospital purposes, the proceeds derived from the tax authorized at such election may be applied for any one or more of the purposes for which said tax may be so voted.

This amendment also provides:

> "The term 'public hospital purposes' as used in this amendment shall be construed to include the acquisition by purchase, lease, or otherwise, and the construction, equipment, operation, and maintenance of public hospital facilities. The term 'public hospital facilities' as used in this amendment shall be construed to include public hospitals, public clinics, public health centers, nurses' homes and training facilities, and related public health facilities of any kind."

The question to be considered is whether the construction of a sewer line to a county hospital is within the purposes intended by the broad terms of these amendments. Looking to the absolute necessity of a sewer line to this county hospital, it would seem obvious that the legislature intended to include such necessary appurtenances.

Your attention is called to Quarterly Report of Attorney General, Vol. 18, page 196, which held that the Board of Trustees of Alabama College had authority to contribute to the cost of a municipal storm sewerage project that drained college property, and to Quarterly Report of Attorney General, Vol. 14, page 19, which held that a county board of education could legally contribute to the cost of a municipal sewerage project to the extent of said project's worth and value to the public school property.

The premises considered, the answer to your question is in the affirmative. The Pickens County Hospital Association can appropriate from the proceeds of the special county tax mentionel above a sum sufficient to enable the town to make the extension of its sewer lines to the hospital.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 26, 1950.

Hon. R. P. Allen, Jr., President,
Marengo County Board of Revenue,
Linden, Alabama.
Counties—Schools—Census.

Counties have no authority to pay for the cost of including, in the Quadrennial School Census, children who are not within the age group of six to twenty-one years, inclusive. Title 52, Section 90, Code of Alabama 1940, as amended.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of June 16, 1950, is as follows:

"I note that Title 52, Section 90 of 1940 Alabama Code as amended, provides that subject to the rules and regulations of the State Board of Education, the school census of the children in the county shall be taken of those between the ages of six and twenty-one, inclusive.

"The census books printed for the use of the enumerators provides under Section 1, paragraph 'c' of 'Reference to School Census Enumeration Law,: 'The census must include all children in the county between the ages of 6 to 21, inclusive, and should include children of ages 2 to 20 inclusive * * * '

"It would be helpful for children in this latter age group (2 to 20 inclusive) to be listed, however, the enumerators are paid by the county, therefore, could they be legally paid by the county for taking the census of persons in this said latter age group?"

I am of the opinion that your question must be answered in the negative, insofar as children between the ages of two and five, inclusive, are concerned.

Title 52, Section 90, Code of Alabama 1940, as amended by Act No. 313, General Acts 1943, page 300, provides as follows:

"The County Board of Education, subject to the rules and regulations of the State Board of Education, shall cause to be taken, under the direction of the county superintendent of education, a quadrennial school census of the children in the county between the ages of six and twenty-one, inclusive. The next school census shall be taken in July of 1946, and thereafter every four years, and the county superintendent of education, upon the direction at any time of the state superintendent of education, shall cause the whole or any part of any school census in his county to be retaken."

See, also, Title 52, Sections 54, 91, and 128, Code of Alabama 1940, as amended by Act No. 313, supra, and Act No. 249, General Acts 1949, page 372.

It is seen from Section 90, as amended, supra, that the quadrennial school census therein provided for shall include children between the ages of six and twenty-one, inclusive. I find in the statute no legal authority for including children between the ages of two and five, inclusive. Since there is no authority for including this age group in the census, it follows that the county is without legal authority to disburse its funds in payment of the cost of including such group.

It is elementary that counties are governmental agencies of the State and are, therefore, liable for only those claims which the law imposes on them or empowers them to contract for, and no officer can charge a county with any claim due him, however meritorious or whatever benefit the county may derive therefrom, unless expressly or by necessary implication authorized by law. **State ex rel. Towle v. Stone,** 236 Ala. 82, 181 So. 281. Cf. **Woodruff v. Beeland** 220 Ala. 652, 127 So. 235.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 26, 1950.

Hon. G. S. Davis,
Chairman,
Marion County Board of Revenue,
Hamilton, Alabama.

Counties—Courts of County Commissioners—Road and Bridge Fund.

1. The proceeds of the special tax of one-fourth of one per-centum authorized by Section 215(a), Constitution of Alabama 1901, and Title 12, Section 186, Code of Alabama 1940, may be used for the erection or construction of necessary public buildings.

2. A coliseum constructed for the purpose of housing fat livestock shows, agricultural and industrial displays and other exhibits consistent with the public good, as described by Act No. 286, General Acts 1945, page 473, is a public building, and the necessity of the construction of such a matter addresses itself to the county governing body.

3. The proceeds of the special tax authorized by Section 215(a), supra, and Title 12, Section 186, supra, must be applied exclusively to the purposes for which the same is levied and collected, and if levied for payment of certain specific debts or

obligations not as yet paid or satisfied cannot be diverted to other purposes.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of March 21, 1950, is as follows:

"Courts of County Commissions—Counties Act No. 286, General Acts 1945, p. 473—Act No. 344, General Acts 1945, p. 560—

"With further reference to the opinion rendered by you to Mr. W. W. Garrett, Chairman Agricultural Center Board of Uriah, Alabama on April 3, 1947, will you please advise if appropriation for a regional coliseum for the purpose of housing fat livestock shows, agricultural and industrial displays et cetera, can be legally made from the Road and Bridge Fund of the counties.

"Will appreciate an immediate answer on this."

In my opinion, your inquiry is to be answered in the affirmative.

The Road and Bridge Fund mentioned by you in your request consists of the money arising from the levy and collection of the special ad valorem tax of one-fourth of one percentum authorized by Section 215(a), Constitution of Alabama 1901. Such Constitutional provision finds statutory implementation in the provisions of Title 12, Section 186, Code of Alabama 1940. Section 215, supra, provides, in pertinent part, as follows:

" * * * provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, (a) any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

It is to be noted that one of the specific purposes for which the proceeds of such levy may be used is in payment of any debt or liability that may be created for the erection or construction of necessary public buildings. It is without question that a coliseum, erected for the purpose of housing fat livestock shows, agricultural and industrial displays, and other exhibits consistent with public good, as described by Act No. 286, General Acts 1945, page 473, is a public building. In my judgment, the question of whether such structure is a "necessary" public building is a matter addressing itself to the sound discretion of the county governing body, and such discretion cannot be controlled or interferred with by judicial tribunals in the absence of fraud. I, therefore, conclude that, if it be determined by your county governing body that such a structure

is a necessary public building, money may be appropriated from the proceeds of the levy authorized by Section 215(a), supra, for the erection or construction thereof.

Inasmuch as you have not indicated in your request for opinion the specific purpose, or purposes, for which the authorized levy was made by your county governing body, I should, as a matter of precaution, call to your attention the fact that said tax so levied and collected must be applied exclusively to the purposes for which the same was so levied and collected. Section 215, supra, and Title 12, Section 186, supra. Therefore, if said levy was made for the payment of certain specific obligations or debts, not as yet paid or satisfied, then the proceeds of such levy could not be diverted to the purpose mentioned by you in your request. See in this connection Quarterly Report of Attorney General, Vol. 37, page 53 and Quarterly Report of Attorney General, Vol. 49, page 104.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 26, 1950.

Hon. Floyd M. Clark,
Chairman,
Calhoun County Commission,
Anniston, Alabama.

Counties—Calhoun County—Solicitors—Traveling Expenses.

County governing bodies have no authority under the provisions of Title 62, Section 28, Code of Alabama 1940, to defray, from the contingent fund therein provided, the tuition and travel expenses incurred by a deputy solicitor in attending a training school for prosecuting attorneys.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of July 11, 1950 is as follows:

"Northwestern University School of Law is conducting a short course for prosecuting attorneys August 14 through August 18, 1950. The fee for the course is $50.00 and of course there would be certain traveling expenses. Mr. R. Clarence Williams, deputy solicitor, of Calhoun County has asked us to defray his expenses for this purpose.

"We would appreciate very much your opinion as to whether we may lawfully appropriate funds for this purpose. We would like also to specifically call your attention to Title 62, Sections 27 and 28 in this connection."

I am of the opinion that your question must be answered in the negative.

Title 62, Section 28, Code of Alabama 1940, which by express provision is made applicable only to Calhoun and Dallas counties, provides as follows:

> "The county governing bodies in such counties are authorized to appropriate out of any monies in the county treasury not otherwise appropriated and to expend not exceeding the sum of twelve hundred dollars per annum for any county purposes not otherwise provided for by law that in their judgment are worthy and for the interest of the county."

It has been long established in this State that courts of county commissioners, boards of revenue, and like governing bodies are courts of strictly limited jurisdiction and can exercise only such powers as are conferred by statute. Biennial Report of the Attorney General, 1934-1936, page 744. Counties are governmental agencies of the State and may exercise only such powers as are expressly delegated to them by the Legislature and such additional powers as may be necessary for the exercise of express powers where the Legislature has not specifically provided the mode or manner of exercising express powers. **Arledge v. Chilton County,** 237 Ala. 96, 185 So. 419; **State ex rel. Towle v. Stone, County Treasurer,** 236 Ala. 82, 181 So. 281; **Poyner et al. v. Whiddon et al.,** 234 Ala. 168, 174 So. 507. They may not expend public funds unless there is a status authorizing such expenditure. **State ex rel. Towle v. Stone, County Treasurer, supra; Mobile County v. Williams, Judge,** 180 Ala. 639, 61 So. 963; **Naftel v. County of Montgomery, 127 Ala. 563, 29 So. 29;** Quarterly Reports of the Attorney General, Vol. 9 at page 35, Vol. 35 at page 19, Vol. 47 at page 170, and **Vol. 54 at page 25.**

Section 28, supra, limits the expenditure of the sum of twelve hundred dollars to "county purposes." Your inquiry, therefore, presents the question whether a deputy solicitor's attendance, at county expense, at a school offering specialized training for prosecuting attorneys is a "county purpose" within the meaning of Section 28, supra. For the reasons which follow, I am of the opinion that it is not.

In two previous opinions, this office has held that the county governing body is without authority to send tractor drivers to a school which trains them in tractor operation and mechanics. Biennial Report of the Attorney General, 1936-1938, page 759; Quarterly Report of the Attorney General, Vol. 8, page 163. It has also held that such governing bodies are without authority to pay the expenses of County Service Commissioners in attending training schools. Quarterly Report of the Attorney General, Vol. 35, page 19.

It is true that the provisions of Section 28, supra, are broad and place at the disposal of the governing bodies of both Calhoun and Dallas counties the sum of twelve hundred dollars per annum for any county purposes

not otherwise provided for by law that in their judgment are worthy and for the best interest of the county. Thus, the effect of Section 28, supra, is to create a contingent fund in the said amount out of which expenses for legitimate county purposes may be paid where the payment of the same is not covered by any other provision of law.

This section and a similar provision applicable to Montgomery County have been constructed by this office, the opinions of which have covered only situations involving the employment of personnel and the purchase of office equipment and supplies.

On April 11, 1935, it was ruled that Montgomery County, under the authority of Act No. 468, General Acts 1931, page 550, which created a similar fund in the amount of seven thousand dollars, might employ a chaplain for prisoners confined in the county jail and alms house. Opinions of the Attorney General, Office Edition, March 1, 1935-April 30, 1935, Vol. 3-A, page 155.

On October 29, 1937, it was ruled that Montgomery County, under the authority of Act No. 468, supra, might employ additional personnel in the Tax Assessor's Office. Quarterly Report of the Attorney General, Vol. 9, page 54.

On March 25, 1939, it was ruled that Montgomery County, under the authority of Act No. 468, supra, might purchase an automobile and pay the expenses of operating the same, and might furnish a telephone, envelopes, letterheads, etc., for the License Inspector. Quarterly Report of the Attorney General, Vol. 14, page 233.

On November 13, 1939, it was ruled that Dallas County, under the authority of Section 28, supra, might furnish the office of the Judge of Probate with electric fans. Quarterly Report of the Attorney General, Vol. 17, page 232.

The term "county purposes" has been strictly construed against the expenditure of county funds for purposes for which the statutes make no express or implied provisions, it having been held that the purchase of a law library for the prosecuting attorney is not a "county purpose" for which public funds might be expended in the absence of express statutory authority. See **Johnson et al. v. Donham et al.**, 191 Ark. 192, 84 S. W. 2d 374, cited in Quarterly Report of the Attorney General, Vol. 19, page 319.

A review of the authorities, including the former opinions of this office, persuades me that the language of Section 28, supra, is not broad enough to authorize payment of tuition and travel expenses incurred by a deputy solicitor in attending a training course for prosecuting attorneys. As was said in a previous opinion: "Under that course of reasoning the Service Commissioner and the county governing body may conclude that the services to be rendered could be discharged in a more excellent and efficient manner by the Service Commissioner taking a four-year course

of special training at the Polytechnic Institute at Auburn, or at the University of Alabama, Yale or Harvard." See Quarterly Report of the Attorney General, Vol. 35, page 19.

This office, however, has ruled that a county may pay the salary of a deputy sheriff while attending the training school conducted for police officers by the Federal Bureau of Investigation at Washington, D. C. See Quarterly Report of the Attorney General, Vol. 47, page 170.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 26, 1950.

Hon. Lecil Gray,
Judge of Probate,
Walker County,
Jasper, Alabama.

Taxation—Deeds—Filing Tax.

A deed from Textron Southern, Inc., to the First Federal Savings and Loan Association of Jasper, Alabama conveying property owned by Textron and leased to certain individuals under a lease-sale contract is subject to a deed filing tax when offered for recordation.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of February 9, 1950 is as follows:

"Textron Southern, Inc. of Cordova, Alabama, is a textile manufacturing company. Such company entered into contracts with certain individuals under the terms of which the company contracted to sell certain lots to individuals. Each instrument was a lease sale contract and the title was retained in the seller until the contract price should be paid in full. Textron Southern, Inc. assigned its interest in those contracts to the First Federal Savings & Loan Association of Jasper with the association paying Textron Southern, Inc. the amount remaining due under those contracts less a certain discount. In order to protect itself the First Federal Savings & Loan Association obtained from Textron Southern, Inc. a deed to the property in question, subject to the outstanding lease sale contracts. Copy of the deed is attached hereto. None of the lease sale contracts referred to above were recorded and, therefore, no state deed or mortgage tax was paid on them. I shall appreciate your providing me with an opinion as to whether or not the deed from Textron Southern,

Inc., to First Federal Savings & Loan Association of Jasper is subject to the state deed tax.

"I might state that the U. S. Collector of International Revenue in Birmingham recently ruled that the deed in question was not subject to the federal deed tax. However, since the language of the federal statute is somewhat different from that of the Alabama statute, I am not certain as to whether or not the deed is subject to the state deed tax and for that reason am requesting your opinion.

"I note that under Title 51, Section 618 of the Alabama Code of 1940, a deed conveying property within this state or any interest therein is subject to the Alabama deed tax with certain exceptions which are set out. The transfer of mortgages on real or personal property upon which the mortgage tax has been paid and deeds or instruments executed for a nominal consideration for the purpose of perfecting title to real estate and deeds executed prior to October 1, 1923, are not subject to the deed tax. I am not certain that any of those exceptions apply to this transaction. On the other hand the lease sale contracts referred to are encumbrances and they are encumbrances which were in existence prior to the time of the sale and which remain as encumbrances after the sale. Furtherfore, the deed in question was in effect given to secure a debt in that the primary purpose of Textron Southern, Inc. in conveying the property in question to the First Federal Savings & Loan Association was to secure the debt due by the purchasers under the lease sale contracts. It, therefore, may follow that because of those facts this deed is not subject to the deed tax, or that if it is subject to the deed tax such tax should be calculated on the basis of the sum of money being paid by First Federal Savings & Loan Association to Textron Southern, Inc. less the amount outstanding on the lease sale contracts. As you know, Section 618 provides that in calculating the deed tax the value of the property in excess of any mortgage or vendors' liens on which the mortgage tax has been paid shall be treated as the taxable value. In this case since no mortgage tax has been paid on the lease sale contracts, they not having been offered for record, I am not certain that the amount of those encumberances should be deducted in calculating the taxable value.

"I shall appreciate your considering this matter and providing me with your opinion at your convenience."

A privilege tax is due on the subject deed when offered for recordation.

The property interest which is being conveyed is the interest which Textron has in the property in question. This interest is most definitely a property interest; and the deed evincing the conveyance of such interest to the Federal Savings and Loan Association comes within the provisions of Title 51, Section 618, Code of Alabama 1940. The deed from Textron to the Association is the subject of your request.

While the Association is a federal instrumentality, the United States Congress has permitted states to impose any tax "on such association" which is not greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions. 12 U. S. C. A. 1464(h). See, also, Quarterly Report of Attorney General, Vol, 16, page 639 and opinions therein cited. But cf. **Crosland v. Federal Land Bank,** 261 U. S. 374, and **Pittman v. H. O. L. C.,** 308 U. S. 21.

The question, as far as an exemption for the federal instrumentality is concerned, becomes one of determining whether or not a state savings and loan association of similar nature would be subject to a deed filing tax on a transaction such as the subject transaction. A proper interpretation of the opinion in Quarterly Report of Attorney General, Vol. 55, page 150, indicates that state savings and loan associations, organized under the provisions of Title 5, Secs. 211 et seq., are not exempt from filing taxes. Though said opinion is not entirely clear on this point, it is to be interpreted as holding that such state savings and loan associations are amenable to filing taxes. Therefore, a deed filing tax, where the deed represents a conveyance to a federal savings and loan association, is due under the provisions of Title 51, Section 618, supra, according to the permission granted in 12 U. S. C. A. 1464(h), supra.

The question of the value of the property interest which is the subject of the conveyance is a matter for determination by the Probate Judge concerned. See: **Long v. Jasper Land Company,** 217 Ala. 593, 117 So. 201. Generally, recited consideration in a deed or other instrument conveying a property interest in prima facie evidence of the market value of the property interest conveyed. See: Quarterly Report of Attorney General, Vol. 14, page 139, and Quarterly Report of Attorney General, Vol. 17, page 265. But the Probate Judge may resort to any other evidence of value. The important question is whether or not the Probate Judge is reasonably satisfied as to the value of the property interest. It would appear, in answer to your query, that the value of the property interest involved in your request is not subject to the proviso in Title 51, Section 618, supra, that only the value in excess of mortgages or vendor's lines shall be taxable. According to the facts which you set out, no mortgage tax has been paid on any mortgages or vendor's lines.

To reiterate, the deed in question is subject to the deed filing tax pursuant to Title 51, Section 618, supra, when such deed is offered for recordation.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 28, 1950.

Hon. Frank Bunkley,
Tax Collector,
Mobile County,
Mobile 15, Alabama.

Tax Collectors—Officers and Offices—Mobile County.

There is no legal authority for the tax collector of Mobile County to close the tax collector's office all day on Saturday.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of June 16, 1950, is as follows:

"I have just been advised by the Hon. Bert E. Thomas, Tax Assessor for Mobile County, that effective June 17 'the office hours of this office will be from 8 a.m. to 5 p.m. from Monday through Friday inclusive the office being closed all day Saturday.'

"For some time I have been of the opinion, and I believe government statistics will bear out the fact that a public employee will give better and more efficient service on a 40 hour week than they will if they are required to work a longer number of hours. In view of this I believe that it will increase the efficiency of this office if we adopt the same hours as announced by Mr. Thomas, especially in view of the further fact that the Tax Assessor's and the Tax Collector's offices are so closely associated. We cannot efficiently operate the Tax Collector's office unless the Tax Assessor's office is operated at the same time.

"Will you please give me your official opinion as to whether or not it is legal to close the Mobile County Tax Collector's Office all day on Saturday and maintain a 40 hour per week schedule, opening from 8 a.m. to 5 p.m. daily from Monday through Friday, inclusive."

The only office in the courthouse the opening and closing of which is fixed by statute is the office of the judge of probate. The opening and closing of this office are fixed by Title 13, Section 276, Code of Alabama 1940, as amended by Act No. 277, General Acts 1949, page 402, which is in part as follows:

"He must keep his office at the Courthouse and open for transaction of business on every day, except Sundays and legal holidays, from nine in the morning until four in the afternoon; but in counties having a population of more than 400,000 inhabitants according to the last Federal census or any subsequent one, he may close his office at 12:00 o'clock noon on Saturday, and may also close his office on such days or portions of days as the County Commission or other

governing body of such county shall authorize or direct the closing of county offices in such county."

Under the provisions of Act No. 74, General Acts 1945, page 72, all the offices of the officials in the courthouse of the several counties of the State (including the office of the judge of probate) are authorized and empowered to close at noon on one day each calendar week during the year, such date to be determined by the governing body of the county by resolution spread upon its minutes.

Title 51, Section 189, Code of Alabama 1940, provides that the tax collector "shall keep his office open at the courthouse all the year round."

It is my conclusion that under the provisions of Section 189, supra, it was the intention of the Legislature that the tax collector should keep his office open at reasonable business hours every day of the week except Sundays and legal holidays. If this had not been the intention of the Legislature, it would not have felt the necessity of enacting laws authorizing the closing of the offices of the officials in the courthouse one-half day each week, the day to be determined by the county governing body, as evidenced by Act No. 74, supra. See also Act No. 404, General Acts 1935, page 877 (a general law of local application); Act No. 29, Local Acts 1939, page 12; Act No. 319, Local Acts 1939, page 208; Act No. 47, Local Acts 1943, page 23; Act No. 54, Local Acts 1943, page 26; Act No. 211, Local Acts 1943, page 111.

In viewing of the above conclusion, it is my opinion that it is not legal to close the tax collector's office of Mobile County all day on Saturday. Such office, as well as all the offices of Mobile County officials in the courthouse, may, as provided by Act No. 74, supra, close at noon on one day each calendar week during the year, such date to be determined by the governing body of Mobile County by resolution spread upon its minutes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 28, 1950.

Hon. Fred Posey,
Clerk and Register,
Autauga County Circuit Court,
Prattville, Alabama.

Costs and Fees—Autauga County—Court of Common Pleas of Autauga County.

Act No. 445, Local Acts of 1947, page 303, approved September 23, 1947.

1. A clark is entitled to 25c for issuing a subpoena but not 25c for each copy thereof.

2. The Clerk of the Court of Common Pleas of Autauga County is not entitled to receive 50c for filing complaints.

3. There is no fee chargeable when a court or clerk delivers a conviction report to the Department of Public Safety. Title 36, Section 68, Code of Alabama 1940.

4. The Clerk of the Court of Common Pleas of Autauga County is entitled to his costs and fees out of the fine and forfeiture fund if a defendant is charged with a felony and the case is nol prossed or the defendant discharged.

5. The Clerk of the Court of Common Pleas of Autauga County has no duties to perform at preliminary hearings and is, therefore, entitled to no fees for services.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of April 18, 1950, is as folows:

"Please refer to Local Act number 445, Local Acts of 1947, page 303, creating the Autauga County Court of Common Pleas.

"In writing this Law section 13 was written into the Law for the express purpose of providing for payment of fees for services rendered which were not otherwise specifically provided for.

"Please advise me if under this section I am permitted to make the following charges for the following services.

"1—A Charge of 25c for making a copy of each subpoena issued.

"2—For filing complaints 50c.

"3—Can I legally charge 25c for making out a conviction report, to the Department of Public Safety, for each highway violation, when the Defendant has been acquitted or the case nol prossed.

"4—If a Defendant is charged with a felony and the case is Nol Prossed or Discharged is the Clerk entitled to any fee for his services.

"5—Where a defendant is charged with a felony, and is on preliminary hearing bound over to the Grand Jury, are any items of cost payable from the County Fine and Forfeiture Fund.

"State Examiners are now engaged in an audit of this office and I would appreciate an early reply from you to clear up this matter."

The Court of Common Pleas of Autauga County, Alabama, is created by Act No. 445 of the Local Acts of 1947, page 303, approved September 23, 1947. The Clerk of the Circuit Court of Autauga County is, by the terms of said Local Act, made the ex officio Clerk of the Court of Common Pleas of Autauga County. Section 9, Local Acts, supra.

In providing for the fees to be received by the Clerk of the Court of Common Pleas of Autauga County, Section 11 of the Local Acts, supra, provides as follows:

"Section 11. The Clerk shall receive the same fees, commissions and costs as are now or hereafter allowed by law to the Clerks of the Circuit Courts of this State, also he shall receive, as ex-officio fees, for ex-officio duties performed as Clerk of the Court of Common Pleas of Autauga County, the same amount which he is paid in the Circuit Court of Autauga County. This fee shall be governed by Title 11, Paragraph 24, Code of 1940, as amended. Said sum shall be paid in Twelve monthly payments payable out of the general fund of Autauga County, Alabama."

In connection with the fees of the Clerk of the Court of Common Pleas of Autauga County, Section 13 of the Local Acts, supra, provides as follows:

"Section 13. The Sheriff and the Clerk of said Court shall, in all cases in which the defendant is found not guilty, or the case nol prossed, or prosecution withdrawn, receive their fees out of the fine and forfeiture fund of Autauga County, Alabama. In Bastardy,, Juvenile, Nonsupport and peace proceeding cases, the Sheriff and Clerk shall be paid their fees and costs out of the Fine and Forfeiture Fund of Autauga County. And in any case where the fees for the Clerk and Sheriff are not specifically provided for, said fees shall be paid out of the Fine and Forfeiture Fund of Autauga County."

It is evident from the above-quoted Section 11 that the Clerk of the Common Pleas Court is to receive "the same fees, commissions and costs as are now or hereafter allowed by law to the Clerks of the Circuit Courts . . ." In order to determine the fees to which the Clerk of the Court of Common Pleas of Autauga County is entitled, therefore, it is necessary to look to the fees for similar services preformed by the Circuit Clerks.

Specifically answering your inquiry No. 1, you are advised that the clerk is entitled to receive a fee of 25c for each subpoena, and not 25c for each copy. Biennial Report of Attorney General 1934-36, page 29.

In answer to your second inquiry, you are advised that the Clerk of the Court of Common Pleas of Autauga County is not entitled to receive a fee of 50c for filing complaints, for the reason that the schedule of fees for circuit clerks makes no provisions for any such fee. Title 11, Section 89, Code of Alabama 1940.

In answer to your inquiry No. 3, you are advised that there is no provision of law whatsoever authorizing a charge of 25c for making out a conviction report to be sent to the Department of Public Safety. Title 36, Section 68, Code of Alabama 1940, requires the court to have forwarded to the Department of Public Safety a report in certain instances. I find no provision of law authorizing a fee for this service.

In answer to your inquiry No. 4, it is my opinion that if a defendant is charged with a felony and the case is nol prossed or the defendant is discharged, the Clerk of the Court of Common Pleas is entitled to receive fees for his services under the provisions of Section 13 of Local Act No. 445, supra. Said fees should be paid out of the fine and forfeiture fund of Autauga County.

In answer to your fifth inquiry, you are advised that the Clerk of the Court of Common Pleas of Autauga County has no duties to perform in connection with preliminary hearings which are conducted by the Judge of said Court acting as a committing magistrate and not as a court. In view of the fect that said clerk has no duties to perform, he is entitled to no fees for such service. See Quarterly Report of Attorney General, Volume 36, page 32.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 28, 1950.

Hon. C. C. Golson,
Chairman, Board of Revenue,
Lowndes County,
Hayneville, Alabama.

Counties — Bridges — Roads and Bridges — Farm-to-Market Road Act—Highway Department.

1. The court of county commissioners has full authority to construct and maintain grade separations on a county road and pay the entire cost thereof.

2. A grade separation may be built on a county road under the provisions of the Farm-to-Market Road Act, the state and county paying half of the cost of the project. So built, the structure must be maintained by the county.

3. The state and county may participate equally, or otherwise, on construction and maintenance of grade separation if route is designated as state highway.

4. If state funds are expended on construction or maintenance of grade separation over railroad, railroad company may be required to pay fifty per cent of the cost thereof.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of June 24, 1950, is as follows:

"The Bureau of County Aid has requested me to ask for your opinion as to the maximum extent the State and County could participate in constructing a County road grade separation structure over the L & N Railroad.

"The present structure was built about 40 years ago by the railroad and is maintained by the L & N Company.

"The structure, when built, was satisfactory but is hazardous to our present day traffic.

"Please render your opinion at earliest convenient date."

In answer to your inquiry, you are advised:

1. That Federal funds may be available to aid the state or county in constructing said grade separation;

2. That the county should investigate the type of agreement which now requires the railroad company to maintain the present grade separation;

3. That the county has authority to construct and maintain a grade separation and pay for it entirely out of county funds;

4. That the county and state may build said grade separation jointly, each providing fifty per cent of the funds required for construction;

5. That if the state will designate the road as a state road, the construction and maintenance can be paid for by the state or by the county, depending upon the agreement by the Highway Department and the county;

6. That if state funds are expended on the project, the railroad company may be required to pay fifty per cent of the cost.

You are advised that the Court of County Commissioners of Lowndes County has full authority to construct and maintain a grade separation on a county road, as referred to in your inquiry. Title 23, Section 43, Code of Alabama 1940. As you know, the cost of such a project would be paid for out of the road and bridge fund of the county or out of the surplus of the general fund transferred into the road fund. Title 23, Section 47, Code of Alabama 1940.

The maximum extent, therefore, to which the county could participate in constructing a county road grade separation structure over the railroad is one hundred per cent (100%).

You are further advised that the state and county may provide equal funds for the construction of the proposed grade separation under the provisions of the Farm-to-Market Road Act. See Title 23 of the Cumulative Pocket Part, Code of Alabama 1940, Section 78(1) et seq. It is anticipated by this act that county funds and state funds be used equally. Section 78(6), Farm-to-Market Road Act, supra.

"If the structure is built under the provisions of the Farm-to-Market Road Act, supra, the county will be required to maintain the structure. Title 23, Section 78(15), Farm-to-Market Road Act, supra.

If the Highway Department of the State of Alabama is so inclined, it may designate the road as a state road and provide state funds, if such funds are available for the construction or maintenance of the grade separation. Title 23, Section 20, Code of Alabama 1940. Under such circumstances, the proportion of state and county funds for construction and maintenance would be subject to an agreement between the state and county. Title 23, Section 20, supra.

I should also call your attention to the fact that if state funds are used in the construction or maintenance of the project, then the railroad company may be required to pay fifty per cent of the cost of construction. Title 23, Section 35, Code of Alabama 1940. In my judgment, state funds would be used if the project is built under the provisions of the Farm-to-Market Road Act, supra, or Title 23, Section 20, Code of Alabama 1940.

There are, therefore, several alternatives for the county to pursue in constructing a new grade separation. The county should also investigate the availability of Federal funds for such a project. See Title 23, U. S. C. A., Section 1 et seq., especially Section 23(d). Information on this subject may be obtained from the Secretary of Commerce of the United States.

Before entering into the project, I suggest that the county governing body review the terms of the written instrument or agreement, if any, which required the railroad company to build or maintain the present structure. It is entirely possible that the railroad company has agreed to participate in new construction or further maintenance. You state no

facts on this subject but it is quite likely that the old agreement will so provide.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 28, 1950.

Hon. H. O. Weeks,
Deputy Solicitor,
Jackson County,
Scottsboro, Alabama.

Automobile Dealers—Licenses.

Oil companies which sell automobile tires, tubes and other similar automobile accessories must pay an annual license fee imposed upon such sellers.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of July 6, 1950 is as follows:

"With further reference to our correspondence, I would appreciate it if you would give me your opinion on whether or not a bulk oil plant would be required to pay the license required by Paragraph No. 465, Title 51 of the 1940 Code of Alabama.

"The local tax representative for the State of Alabama has cited all of the oil companies in Scottsboro under this Section and I would like to have your opinion before we proceed further in the matter.

"The oil companies, of course, are wholesale dealers and most of them do stock tires, tubes and items of this nature, to be sold to their dealers for resale. These companies pay the wholesalers license and I would like to know whether or not they would be required to pay the license required of automobile accessory dealers also.

"Your prompt attention will be appreciated."

From the facts set out in your request, it would appear that the oil companies in question are required to pay the annual license fee required by Act No. 596, General Acts 1939, page 966, approved June 28, 1940 (Title 51, Section 465, Cumulative Pocket Part to Code of Alabama 1940).

This section imposes an annual license fee on each person selling "motor vehicle accessories, including . . . motor vehicle batteries, and/or

tires . . ." The facts in your request clearly indicate that the companies in question sell automobile tires and other similar accessories. The companies do not come within the proviso for "licensed filling stations or garages." Even if such companies did come within the proviso, there is nothing to indicate that their stock of accessories does not exceed the wholesale value of $75.00.

The fact that the oil companies pay a wholesaler's license for the sale of oil at wholesale does not prevent the payment of the license fee required by Act No. 596, supra, for persons selling automobile accessories. In this connection, see Title 51, Section 838, Code of Alabama 1940, which provides:

> "Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business."

Cf. Biennial Report of Attorney General, 1928-30, page 337.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 28, 1950.

Hon. Ralph P. Eagerton,
Chief Examiner of Public Accounts,
CAPITOL.

Counties—Banks and Banking—Bonds — Warrants—Gasoline Roads and Bridges—Contracts.

1. A county, having issued gasoline tax anticipation warrants, and having designated a national bank as paying agent or trustee depository, the resolution executed by county board of revenue providing for issue of said warrants containing a schedule of payments sufficient to cover trustee's annual fee, and a provision that any additional sums which may be necessary to pay the principal and interest on said warrants shall be paid into the special fund, the trustee depository can retain service charges out of funds remitted to it.

2. Quarterly Report of Attorney General, Vol. 55, page 133, distinguished.

Opinion by Assistant Attorney General Johnson.

Dear Sir:

Your request for an official opinion, bearing date of May 24, 1950, is as follows:

"In making an examination of the records and accounts of the Board of Revenue of Dekalb County, a situation has arisen upon which we respectfully request your opinion. We are holding up final completion of the report pending your advice on the matter.

"On a gasoline tax anticipation warrant issue of DeKalb County the First National Bank of Montgomery was designated as the trustee bank for payment of principal of and interest on such issue. You are, of course, familiar with the method of handling the payment to the bank-trustee by the State Comptroller. A specified amount each month is deducted by the State Comptroller from the amount of gasoline tax accruing to the County each month and such amount so deducted is remitted to the designated trustee bank. This, in effect, creates a sinking fund in the trustee bank from which the warrant issue is to be liquidated.

"During the period covered by the examination trustee's fee was charged against this fund so created in the First National Bank of Montgomery. From the attached resolution it appears that these monies so deposited in the First National Bank of Montgomery were to be used **solely** for the payment of the principal of and the interest on the gasoline tax anticipation warrant issue. Based on this and on a ruling as found in Quarterly reports of the Attorney General (Volume 55, page 133) the Examiner making the examination has made an exception to the trustee's fee being charged against the account by the bank. It further appears that the Chairman of the Board of Revenue anticipated no such charge or charges against the fund (see file attached—letter from Honorable J. L. Thompson, Chairman, DeKalb County Board of Revenue, addressed to Ralph P. Eagerton, Chief Examiner of Public Accounts, dated January 12, 1950).

"In view of the above, request is made to you that you give me your opinion of the following:

"1. Is it an illegal payment from the fund and should a charge-back be made by the Examiner of the amount or amounts so charged against this sinking fund other than principal and interest payments made therefrom?

"2. If such charge-back should be made by the Examiner, against whom should the charge be made? (A County warrant was not drawn for this payment but rather a change made by the bank against the account).

"Attached hereto is the file of correspondence pertaining to this matter and which will no doubt give a more complete picture of the situation referred to above. Also, attached hereto is the resolution of the Board of Revenue of DeKalb County pertaining to the warrant issue and trustee designation.

"Please return the attached correspondence file and resolution when you advise me on the above matter as it has been requested by the Chairman of the Board of Revenue that this resolution be returned to him."

In answer to your first inquiry, you are advised that the retention of a reasonable service charge by the trustee depository, The First National Bank of Montgomery, is not an illegal payment from the special fund created by the DeKalb County Board of Revenue for the purpose of retiring the indebtedness incurred by the issuance of certain gasoline tax anticipation warrants.

There is no doubt about the right of a county governing body to agree or contract to pay such a service charge out of its share of the proceeds of the State excise tax on gasoline. Quarterly Report of Attorney General, Vol. 55, page 133.

Authority to retain its service charges out of the special fund has been granted to the trustee depository by resolution, passed by the Board of Revenue on May 31, 1948, the same resolution that designated The First National Bank of Montgomery as paying agent or trustee for said special fund.

This authority is implied by the schedule of payments into the special fund on page 4 of said resolution. I am advised by the State Comptroller and a representative of the trustee that the amounts set forth in said schedule include a sufficient amount to meet the principal and interest payments and also to pay the service charges in the form of annual trustees' fees.

Further, I think that authority to retain its service charges out of the special fund was expressly granted to the trustee depository, The First National Bank of Montgomery, by Section 4 of said resolution wherein it is stated in pertinent part as follows:

"Section 4. * * * In addition thereto (the amounts set forth in the foregoing schedule), there shall also be paid into the special fund during each successive six-months period beginning December 1, 1948, and continuing until the principal of and interest on all the warrants shall have been paid in full, the following amounts: * * * (c) Any additional sums which may be necessary to pay the principal and interest on the warrants as said principal and interest are herein provided to be paid."

By including Section 4(c) in the resolution and fixing the amounts to be paid into the special fund in such amounts as would be adequate and available to pay such service charges as would lawfully be assessed by the trustee depository, it seems to me that the Board of Revenue of DeKalb County clearly manifested its intent that such charges as the trustee's handling fees would be retained out of the special fund.

As I read provisions 6 and 7 of the resolution, there is nothing therein that militates against the conclusion herein reached for the reason that the payment of a reasonable service charge to the trustee for its services in connection with payment of the principal of and interest on the warrants from time to time is a necessary part of the cost of paying the principal of and interest on said warrants.

Reference was made in your inquiry to Quarterly Report of Attorney General, Vol. 55, page 133, supra.

The conclusion reached herein is not in conflict with the opinion referred to above, as there it did not appear that the funds deposited with the trustee included a sufficient amount to cover the trustee's annual fee, and it does not appear that the authority granted in Section 4(c) in this resolution was included in the contract construed in the above opinion.

In view of my answer to question numbered 1, it is unnecessary to answer your question numbered 2.

The correspondence file attached to your request is returned as requested.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 28, 1950.

Hon. W. M. Beck,
Speaker of the House of Representatives,
Legislature,
Montgomery, Alabama.

Travel allowances for members of the Legislature as provided for by the Constitution and by statute possess the attributes of an appropriation by law and thus the State Comptroller is authorized to draw his warrants against the General Fund for the payment thereof.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of July 27, 1950, is as follows:

"Under date of July 14th you ruled that the $10.00 to be paid to the members of the Legislature, pursuant to Constitution Amendment LVII as set forth on page 66 of the 1949 Supplement of the 1940 Code, Volume I, constitutes a continuing appropriation to be paid from the General Fund.

"The question now presents itself as to whether or not travel allowance may be so paid. The constitution reads as follows:

" 'Each member of the Legislature shall be paid 10c per mile in going from his residence, etc.'

"It is thought that such travel allowance follows the same reasoning as the $10.00 per day, as set forth in the Constitution.

"An official opinion is desired on this question."

Amendment LVII, Constitution of Alabama, 1901, provides, in pertinent part, that, "Each member of the Legislature shall be paid ten cents per mile in going from his residence to, and in returing to his residence from, the seat of government, to be computed by the nearest usual route traveled; and not more than one such travel allowance shall be paid for each session of the Legislature."

Title 32, Section 13, Code of Alabama, 1940, specifies the exact number of miles for which each member of the Legislature may be paid.

Under the rationale of my opinion of July 14, referred to in your request, the foregoing provisions have the force of a continuing appropriation for the payment of travel allowance to members of the Legislature. Certainly the item of mileage expense connotes the attributes of fixedness and certainty, the generally recognized concomitants of an appropriation by law. Although, the sums here are for travel allowances rather than for salaries the principle is the same. Other states have so held. **People v. Goodykoontz,** 22 Colo. 507, 45 P. 414; **Crawford v. Hunt,** 41 Ariz. 229, 17 P. 2d 802; **Brainerd v. Grimes,** 7 Wash. 191, 34 P. 947, **Humbert v. Dunn,** 84 Col. 57, 24 P. 111.

The premises considered, you are advised that the State Comptroller is authorized to draw his warrants against the General Fund to pay travel allowances to the members of the Legislature, despite the fact that there is no specific Legislative appropriation therefor.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 1, 1950.

Hon. J. G. Austin,
Superintendent,
City School System, Walker County,
Carbon Hill, Alabama.

Counties—Municipalities—Schools—Census — County Boards of Education—City Boards of Education.

1. Where the population of an incorporated municipality having a city board of education falls below 2,500 inhabitants,

as shown by the 1950 Federal Census, the municipality cannot during the ensuing decade retain such city board of education by extending its corporate limits and thereby increasing its population to 2,500 or more inhabitants.

2. The official population figures, as finally published by the Bureau of the Census at Washington, D. C., is conclusive on the question of whether the public schools of an incorporated municipality must be administered by a city board of education, and such federal census cannot be contradicted by an independent municipal census taken for the purpose of correcting alleged errors in the federal census.

3. When the population of an incorporated municipality, as shown by the 1950 Federal Census, has fallen below 2,500 inhabitants, the existing city board of education becomes defunct, and the administration and supervision of the municipality's public schools becomes vested in the county board of education by operation of law.

4. Such change in the administration and supervision of the municipality's public schools automatically takes effect on the ninetieth day after the first day of the first regular legislative session held next after the publication by the federal government of the regular 1950 Federal Decennial Population Census for Alabama.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of July 6, 1950, is as follows:

"As Superintendent of the City Schools of the City of Carbon Hill, Alabama, permit me to request a ruling from your office on certain questions pertaining to the City Board of Education of the City of Carbon Hill, Alabama.

"According to the 1930 Federal census, the City of Carbon Hill had a total population of more than 2500 inhabitants. This qualified the City to have a City Board of Education to supervise its educational system, and such a Board has been functioning within the City since that time. When the 1950 Federal census is finally promulgated, it it my understanding that it will reveal that the City of Carbon Hill has a population of slightly over 2,000 only. Some of our citizens feel that the census figures are inaccurate, and that if all of the citizens who are temporarily working away from the City of Carbon Hill, due to the slump in employment in this area, had been counted, then our population count would have brought us up to the required 2500. Our questions are these:

"1. Should the City of Carbon Hill extend its corporate limits so as to take in adjacent mining camps and villages and increase its population to more than 2500 inhabitants, would it be eligible to retain its present City Board of Education?

"2. If a municipal census of the City of Carbon Hill should reveal that the City had more than 2500 inhabitants, would the City of Carbon Hill be entitled to retain its City Board of Education, on the theory that the municipal census might be a more conscientious, and therefore, more accurate count than the Federal census?

"3. Once a City has obtained the required population level for a City Board of Education and his established same, and it has functioned for ten years or more, is the City, nevertheless, entitled to have the Board continue to function with the same supervision over its educational facilities where the Federal census reveals that its population has fallen below 2500 inhabitants?

"4. If your conclusion as to all of the previous questions should be in the negative, we should like to know at whose instance, at what time, and to whom the facilities of the City Board of Education of the City of Carbon Hill, Alabama, revert."

1. I am of the opinion that your first question must be answered in the negative.

Title 52, Section 148, Code of Alabama, 1940, contains the definition of a "city," within the meaning of the school Laws of Alabama, as follows:

"A city within the meaning of this title shall include all incorporated municipalities of twenty-five hundred or more inhabitants, according to the last or any succeeding federal census."

I am advised that the official population figures compiled as a result of the 1950 Federal Census have not yet officially been published. Certain tentative estimates of population have been reached and have been announced in the Press. These estimates are, however, subject to revision and are not official. The final official count will be published at some future date by the Director of the Bureau of the Census at Washington, D. C.

In my opinion, the official population figures, to be announced by the Bureau of the Census, showing the 1950 population of the Town of Carbon Hill, Alabama, will be conclusive on the question of whether the Town of Carmon Hill is a "city" within the meaning of the School Laws of Alabama, and those provisions thereof which entitle a "city," as defined by Section 148, supra, to administer the affairs of its public schools through its own city board of education. The fact that, subsequent to the publication of the 1950 Federal Census, the population is increased by an extension of corporate limits would not, in my judgment, operate to in-

crease the population of the Town of Carbon Hill within the meaning of Section 148, supra. The official 1950 Federal Census figures will control for the next decade, and until the 1960 Federal Census or some succeeding federal census shows an increase in population to 2,500 or more inhabitants.

2. I am likewise of the opinion that your second question must be answered in the negative.

Section 148, supra, provides expressly that the basis for determining whether an incorporated municipality is a "city," within the meaning of that section, shall be the last or any succeeding **federal** census. When the 1950 Federal Census is published it will be the only authoritative and legal guide for the population of the Town of Carbon Hill. An independent municipal census, however accurate and conscientious, would be ineffective to change the official population as fixed by the 1950 Federal Census, which cannot be contradicted by any other census taken for the purpose of correcting alleged inaccuracies in the federal census.

3. I am likewise of the opinion that your third question must be answered in the negative.

Section 148, supra, and related sections found in Title 52, provide expressly that only those incorporated municipalities having a population of 2,500 or more as determined by the last or any succeeding federal census, shall be entitled to administer their public school affairs through a city board of education. Should the population, as thus determined, fall below 2,500 inhabitants, the general administration and supervision of its public schools and educational interests becomes vested in the county board of education by operation of law. **Dunlap v. Board of Education of Winston County, et al,** 218 Ala. 631, 120 So. 144; **Carey v. City of Haleyville, et al,** 230 Ala. 401, 161 So. 496.

4. In answer to your fourth question, you are advised that the facilities, jurisdiction, powers and authority of the existing city board of education to administer and supervise the public schools and educational interests of the Town of Carbon Hill will, should its population fall below 2,500 inhabitants, revert to the County Board of Education of Walker County by operation of law. Such change of administration will automatically take effect on the ninetieth day after the first day of the first regular legislative session held next after the publication by the federal government of the 1950 Decennial Population Census for Alabama. Title 1, Section 14, Code of Alabama 1940; Opinion rendered Honorable J. Charles Stanley, Tax Assessor of Calhoun County, on June 21, 1950, a copy of which is enclosed for your information.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 1, 1950.

Hon. Henry W. Smith, President,
Etowah County Board of Revenue,
Gadsden, Alabama.

Sheriffs—County Governing Body—Counties—Etowah County — Prisoners—Jail and Jails.

1. The county governing body and not the sheriff should pay for the feeding of prisoners in jail to the extent that the amount required exceeds sixty cents per capital per day when the sheriff is on a salary basis.

2. The county governing body is authorized to pay over sixty cents per day for the feeding of prisoners in the county jail, when the sheriff is on a salary.

3. The county governing body may require such records and reports from the sheriff as will enable the county governing body to ascertain the amount to be appropriated for feeding prisoners in the county jail.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of June 28, 1950, is as follows:

"As President of the Etowah County Board of Revenue, and under authority of Title 55, Section 240 of the 1940 Code of Alabama and Amendments thereto, I respectfully request an opinion of you on the questions arising from the following statements:

"The Sheriff of Etowah County, Alabama was, by Local Act approved August 15, 1947, said act appears in the 1947 Local Acts of Alabama, Page 232, removed from the fee system and placed on a yearly salary basis.

"Under Title 45, Section 142, et seq. and amendments thereto, the Sheriff is allowed up to 60 cents per capital daily for feeding each prisoner confined in the county jail, such amount is paid by the State. Under the old fee system, the Sheriff necessarily had to make up any deficiency, if the cost ran over 60 cents per prisoner per day, from his own resources.

"The questions which arise at this time are:

"1. Is the Sheriff liable for all cost in excess of 60 cents per day per prisoner for feeding expenses?

"2. Can the Board of Revenue of Etowah County legally pay the charges, over and above, 60 cents daily for feeding prisoners held in the county jail?

"3. If the answer to question number two is in the affirmative, is it mandatory for the Etowah County Board of Revenue to pay such charges over and above 60 cents daily for feeding each prisoner, since it is impossible for the Board to keep a daily running record on the expenses of feeding such prisoners and such costs can only be ascertained from the lists of prisoners and costs of feeding which is supplied by the Sheriff on or before the 10th day of each month and which covers the month immediately preceding?

"Your usual prompt attention to this matter will be greatly appreciated."

In answer to your inquiry number one, you are advised that the sheriff is not liable for all costs of feeding prisoners in excess of sixty cents per day per prisoner. Such excess must be paid by the county governing body.

In answer to your second inquiry, you are advised that the county governing body of Etowah County is authorized to pay the amount necessary to feed prisoners in jail even if said amount exceeds sixty cents per day per prisoner.

In answer to your third inquiry, it is my opinion that it is mandatory for the county governing body of Etowah County to pay charges exceeding sixty cents per day per prisoner unless the per capital amount appears to the board to be unreasonable or unduly excessive.

As stated in your inquiry, the sheriff of Etowah County is now on a salary basis instead of the fee system. Act No. 318, Local Laws 1947, page 232, approved August 15, 1947.

Sheriffs on a fee basis are entitled to receive an allowance for the purchase of food for prisoners in jail and are also entitled to an allowance for preparing and serving the food. Title 45, Section 144, Code of Alabama 1940, as amended, and Title 45, Section 145, Code of Alabama 1940.

It is provided in Title 45, Section 146, Code of Alabama 1940, that when the sheriff is on a salary basis he is not entitled to receive the allowance for feeding prisoners and the allowance for preparing and serving the food, but that such allowance, when collected from the State of Alabama, must be paid into the county treasury. Under such circumstances, the county governing body is required to furnish the sheriff with the help necessary for the preparing and serving of food. Title 45, Section 146, supra. I also call your attention to the fact that the local law, supra, and section 4 thereof, provides as follows:

"Section 4. The Board of Revenue, or other like governing body, of Etowah County shall provide said sheriff with the necessary quar-

ters, automobiles, accessories, gasoline, oil and repairs, books, stationery, office equipment, supplies, postage, and other conveniences and equipment necessary for the proper and efficient conduct of the affairs of said office."

When the legislature places the sheriff on a salary basis as done by Act 318, supra, it is my opinion that the legislature intends to have the sheriff receive certain compensation—a salary—and also intends to have all fees, which were formerly collectible by the sheriff, paid into the county treasury. Section 4 of Act No. 318, supra, together with Title 45, Section 146, supra, indicate that the county should furnish to the sheriff those services, supplies and conveniences, which formerly the sheriff had provided for himself, among such supplies or conveniences is food for prisoners in jail. It is my opinion, therefore, that the sheriff should continue to claim from the State his fees under the provisions of Title 45, Section 144, Code of Alabama 140, as amended, but that such amount when received should be paid into the country treasury. The obligation is on the county and not the sheriff on a salary basis, to pay the actual expenses of feeding prisoners in jail, so long as those expenses are reasonable.

In the third part of your inquiry, it is stated that it is impossible for the Board to keep a daily running record of the expenses of feeding such prisoners, and that the costs can only be ascertained from the lists of prisoners and cost of feeding which is supplied by the sheriff on the tenth day of the month following the month during which the prisoners are fed. I do not believe that it is impossible for the Board of Revenue to ascertain the number of prisoners in jail on a running daily basis. It is the duty of the court of county commissioners to supervise the feeding of prisoners in jail, Title 45, Section 142, Code of Alabama 1940, and in my opinion, the actual feeding should be performed by the sheriff under the supervision of the county governing body. Title 45, Section 143, Code of Alabama 1940. The county governing body, in my opinion, has ample authority to require the sheriff to furnish such records and reports to the county governing body as will enable the county governing body to make a proper appropriation for feeding prisoners.

In my opinion the holding herein does not conflict with **Holcombe v. Mobile County**, 26 Ala. App. 151, 155 So. 638, cert. den. 229 Ala. 77, 155 So. 640.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 3, 1950.

Hon. R. F. Lyon,
County Treasurer,
Shelby County,
Columbiana, Alabama.

Sheriffs—Costs and Fees—Mileage.

The fee provided for in Act No. 177, General Acts 1947, page 62, should not be paid unless there is a conviction.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 28, 1950, is as follows:

"Will you, please, give me legal opinion regarding the payment of mileage fees to sheriffs as provided under AN ACT (H. 315,—Garrett No. 177 1947)?

I note that Sec. 1 of this act provides for the payment of ten cents per miles 'On conviction of the defendant. . . .'

"That Sec. 2 makes it the duty of the trial court to tax as costs 'Along with other costs against the defendant, a sum equivalent to ten cents per mile herein authorized to be paid the sheriff or his deputy' for serving such processes.

"That section 3, provided . . . . "That the trial judge of such court shall approve the amount shown in the affidavit before the same can be collected by the sheriff as part of the cost.'

"My question is as follows:

"Can I, as Treasurer of Shelby County, Ala., legally pay, from the Fine and Forfeiture funds of this county, the sheriff such mileage fees in cases wherein the state has failed to prosecute or where dismissals have been ordered, although the trial judge of such court shall have approved the amount shown in the affidavit as part of the cost?"

In my opinion, you should not pay mileage fees to the sheriff under the provisions of Act No. 177, General Acts 1947, page 62, when the State has failed to prosecute or where a dismissal is entered.

Act No. 177, supra, provides for a mileage fee to the sheriff for serving a writ of arrest when there is a **conviction.** If there is no conviction therefore, there is no mileage fee to which the sheriff is entitled. There would be no occasion for paying this mileage fee out of the fine and forfeiture fund; neither would there be any occasion for the trial judge to approve

an affidavit under the provisions of Section 3 of Act No. 177, supra, when there has been no conviction. The fact that the trial judge does approve an affidavit in the case of a discharge or in the case of a dismissal of a criminal prosecution adds nothing to the claim of the sheriff for the reason that he has no claim unless there is a conviction.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 3, 1950.

Mrs. A. L. Harmon,
Register, Circuit Court,
Houston County,
Dothan, Alabama.

Appeals—Registers—Transcripts.

A register in chancery may agree to the preparation, by attorneys for both sides of a suit, of the transcript on appeal, provided the register charges no fee therefor, and provided further that the register certifies the transcript as true and correct.

Opinion by Assistant Attorney General Straub.

Dear Madam:

Your request for an official opinion bearing date of June 29, 1950, is as follows:

"Kindly advise me if I, as Register of the Circuit Court of Houston County, Alabama, in Equity, would be authorized to agree, in an appealed case to the Supreme Court, for the attorneys to prepare, or have prepared, the transcript and for me not to charge for the preparing of such transcript as a part of the Register's fees after the appeal is perfected or determined.

"This office is on a salary basis, and is not sufficiently staffed to prepare a voluminous transcript at this time.

"This question is vital because of the contemplation of appeal of a case which will be very voluminous."

I am unable to find any provision of law prohibiting you from agreeing to the procedure outlined in your request.

It is, of course, the duty of the register to prepare the transcript for appeal, when requested to do so by an aggrieved party to a suit. Title 13, Section 215, Code of Alabama 1940; Title 7, Section 768, Code of Alabama 1940.

However, if both parties agree to arranging for the preparation of the transcript and the register does not charge a fee therefor, I can see no reason for prohibiting such procedure; providing the transcript is properly arranged and is certified by the register. Supreme Court Rule 26, Appendix; Title 7, Code of Alabama 1940.

Title 7, Section 744, Code of Alabama 1940, provides that attorneys may make an agreed case on appeal.

Title 7, Section 773, Code of Alabama 1940, provides that counsel may agree to an abstract of the record, thus minimizing the cost of appeal.

Since such agreements are permitted and in the absence of express prohibition, it is my opinion that counsel for both sides of a suit in equity, and the register in chancery may agree to the preparation by the attorneys, of the transcript on appeal, where the register charges no fee therefor.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 3, 1950.

Hon. Walter B. Jones,
State Oil and Gas Supervisor,
Geological Survey of Alabama,
University, Alabama.

Oil and Gas Board—Drilling Permit.

The State Oil and Gas Board, under its present orders, may not issue a permit to drill an oil well in the Eutaw Zone of the East Gilbertown Field on a drilling unit where there is a producing well already located on said drilling unit.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 12, 1950, is as follows:

"Enclosed herewith please find transcript of hearing of the Oil and Gas Board, May 29, 1950.

"Please refer to page 31 of the transcript to motion made by Dr. Milton Fies, Board Member, requesting your opinion on the power of the Board to give its approval to more than one well on a 40-acre unit in the East Gilbertown field.

"Also enclosed please find a brief sent to me by attorneys for Carter Oil Company, with request that it be forwarded to you.

"At present, the Oil and Gas Board, in its Order No. 2 providing spacing rules and regulations for production from the East Gilbertown field, has fixed the drilling unit at 40 acres. I am enclosing a copy of Order No. 2.

"Mr. John Y. Christopher, representing R. G. Houser, has sent you his brief. For fear that it might not have reached you, I am enclosing a copy which he sent to me.

"If any additional information be needed, please let me know."

The precise question propounded by you is: May the Oil and Gas Board issue a permit to drill an oil well on a drilling unit where there now exists a producing well on said drilling unit?

The answer to this question is in the negative, under the present orders of the State Oil and Gas Board.

Subsection B of Section 12 of Act No. 1, General Acts of Alabama 1945, provides as follows:

"B. For the prevention of waste and to avoid the augmenting and accumulation of risks arising from the drilling of an excessive number of wells, the Board shall, after a hearing establish a drilling unit or units for each pool. A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one well, and such unit shall constitute a developed unit as long as a well is located thereon which is capable of producing oil or gas in paying quantities. It is provided, however, that the Board shall have no authority to fix a drilling unit as a basis for the development or opertaion of any pool capable of producing oil in excess of 40 acres."

On April 25, 1947, the State Oil and Gas Board, under the authority delegated to it by Act No. 1, supra, promulgated Order No. 2. Section 1 of said Order reads in pertinent part as follows:

"In order to prevent waste and avoid the drilling of unnecessary wells, it is the intent and purpose of this order to establish a drilling pattern based on one well to each unit of forty (40 acres; to designate the location of the well and the acreage to be included in each unit; and where the owners have not agreed to integrate their interests, the Board shall, to avoid waste and the drilling of unnecessary wells, require such owners to do so, and to develop their lands as a drilling unit as authorized by Sec. 13 of Act. No. 1 of 1945.

"The following rules and regulations are adopted for the Eutaw Zone of the East Gilbertown Field in order to effectuate that purpose.

"A. The Eutaw Zone is hereby divided into drilling and production units of forty (40) contiguous acres each. Such units shall be applicable to the Eutaw Zone of the East Gilbertown Field.

"B. Acreage as used herein shall be construed to mean acreage proved and developed for the production of oil.

"C. When two or more separately owned tracts of land are embraced within a drilling unit, the owners thereof may validly agree to integrate their interests and develop their lands as a drilling unit. Where, however, such owners have not agreed to integrate their interests, the Board shall for the prevention of waste or to avoid the drilling of unnecessary wells, require such owners to do so and develop their lands as a drilling unit, after notice and hearing and upon the conditions stated in Section 13 of Act No. 1 of 1945.

"D. The oil produced from any well or any unit embracing more than one separately owned tract of land shall be allocated or distributed among all such tracts in the proportion that the area of each such tract bears to the entire area of such unit. Each such tract as to which the obligations of the owner are separate shall be considered as a separately owned tract of land,' even though a single owner may own more than one such tract.

"E." **Not more than one well on each unit shall be drilled to the Eutaw Zone."** (Emphasis supplied.)

It plainly appears from said Order that the same was adopted to carry out the provisions of Subsection B of Section 12, hereinabove quoted.

It is to be specifically noted that Subsection B of Section 12, supra, provides that a drilling unit as contemplated in said section means the maximum area which may be efficiently and economically drained by one well, and said subsection further proves that such unit, after it has been set up by the Board, **shall constitute a developed unit as long as a well is located thereon which is capable of producing oil and gas in paying quantities.**

It appears from Section 1 of Order No. 2 that the Oil and Gas Board, in the Eutaw Zone of the East Gilbertown Field, has set up drilling units of forty acres each. Subsection E of Section 1 of Order No. 2 in no uncertain terms provides that not more than one well shall be drilled on each unit in the Eutaw Zone of the East Gilbertown Field. This, of course, means that the Board shall not issue a permit for the drilling of an additional well on any unit so established where a producing well is located on said unit at the time an application for a permit is made.

You are, therefore, advised that as long as Order No. 2, promulgated by the State Oil and Gas Board on April 25, 1947, is in force and effect, the State Oil and Gas Board has no authority to issue a permit to drill a well on any forty acre unit where a producing well is already located on said unit in the Eutaw Zone of the East Gilbertown Field.

I have considered the briefs filed by attorneys for Mr. R. G. Houser and by attorneys for the Carter Oil Company in reaching the conclusion hereinabove stated.

I thoroughly agree with the contention of counsel for Mr. Houser that it was the intention of the Legislature to place in the State Oil and Gas Board all authority and power connected with the production of oil and gas in this State. However, the intention of the Legislature to be derived from the whole context of the Act has nothing to do with the question here considered as long as Order No. 2 is outstanding.

I deem it advisable to state, however, that nothing which I have said hereinabove would prevent the State Oil and Gas Board from decreasing the size of the drilling unit if it sees fit so to do. I am advised that the Houser Drilling Company has heretofore filed an application seeking to change the spacing units as established by Order No. 2, and the State Oil and Gas Board, after due notice and hearing, has refused to change said spacing units of forty acres each.

In reaching the conclusion hereinabove stated, I have not taken into consideration any geological factors presented at the hearing by the State Oil and Gas Board on May 29, 1950, and have only considered the legal aspects of the question presented by you.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 8, 1950.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Weumpka, Alabama.

Counties—Claims—Employers and Employees—Roads and Bridges.

Since counties are not liable in damages for the tortious acts of their officers, agents, servants and employees committed while exercising governmental functions, county funds cannot be expended in payment for the death of a county employee killed in line of duty while engaged in work on the public roads.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of June 30, 1950, is as follows:

"At the request of the Commissioners Court of Elmore County I am writing you this letter in order to determine whether or not Elmore County can legally pay a claim filed against it under circumstances

such as those set out in the following paragraphs. We respectfully request an opinion from you on this subject.

"Mr. H. H. Rowe was a county employee and was working for the county when he was killed. His death occurred when he jumped or fell from a county truck which was being driven by a fellow employee of the county. This truck was carrying materials which were to be used in the repairing of a bridge in Elmore County. It is my understanding that the truck was probably over-loaded and it is possible that it was not a proper truck for the hauling of bridge material.

"The truck had a long trailer attached to it on which other bridge material was loaded. As the truck proceeded around a curve and down a hill it met a vehicle coming up the hill. The driver of the county truck was on the wrong side of the road as he rounded the curve. In order to prevent a collision he turned the wheels sharply and while this did prevent a collision it caused the trailer to sway and break loose from the truck . Mr. Rowe opened the door and looked back at the trailer. He either jumped or fell from the truck into the path of the trailer and was killed in this manner.

"The driver of the truck was arrested for reckless driving and a preliminary hearing was held which resulted in complete exoneration of the driver. However, it seems that the truck had bad brakes although this fact was not known by the driver.

"Mr. Rowe left a widow and a minor child who are in danger of being in destitute circumstances. It is the desire of the Commissioners Court of Elmore County to assist Mr. Rowe's family if there is any way to do so. We would certainly appreciate your opinion as to whether or not Elmore County can make any payment under these circumstances."

Your question is answered in the negative.

It has long been settled that counties, acting in their public capacity and as auxiliaries of the State, are not on common law principles subject to liability for torts committed by their officers, agents, servants and employees in the exercise of governmental functions, and can be required to liability for torts committed by their officers, agents, servants and constitution—**Stone v. State ex rel. Horn**, 251 Ala. 240, 37 So. 2d 111; **Moore v. Walker County**, 236 Ala. 688, 185 So. 175; **First National Bank of Scottsboro v. Jackson County**, 227 Ala. 448, 150 So. 690; **Turk v. County Board of Education of Monroe County**, 222 Ala. 177, 131 So. 436; **Phillips v. Tuscaloosa County**, 212 Ala. 357, 102 So. 720; **Hamilton v. Jefferson County**, 209 Ala. 517, 96 So. 628; **Jones et al v. Jefferson County**, 206 Ala. 13, 89 So. 174; **Askew v. Hale County**, 54 Ala. 639; 15 Corpus Juris, Counties, Section 274, page 571; 20 Corpus Juris Secundum, Counties, Section 215, page 1067; 14 American Jurisprudence, Counties, Section 48, page 215, et seq.; 39 Lawyers' Reports, Annotated 33, note.

I know of no provision of law which expressly gives to the county governing body the right to expend county funds for the purpose mentioned in your request, nor do I know of any provision from which it can be said that it is necessarily implied that such an expenditure lawfully may be made.

Upon numerous occasions similar questions have been considered by this office, which consistently has held that county governing bodies are without lawful authority to expend county funds in liquidation of damages sustained, by persons and property, as a result of the tortious acts of county officers, agents, servants and employees while exercising governmental functions. See Quarterly Report of Attorney General, Vol. 50, pages 205 and 178 . Quarterly Report of Attorney General, Vol. 46, page 135; Quarterly Report of Attorney General, Vol. 39, page 15; Quarterly Report of Attorney General, Vol. 33, page 79; Quarterly Report of Attorney General, Vol. 23, page 220; Quarterly Report of Attorney General, Vol. 15, page 219; Quarterly Report of Attorney General, Vol. 7, page 9; Quarterly Report of Attorney General, Vol. 3, page 44; Opinions of the Attorney General, May 1, 1935-June 30, 1935, Vol. 4-A, page 149; Opinions of the Attorney General, January 1, 1932-February 29, 1932, Vol. 8, page 353; Biennial Report of the Attorney General, 1936-1938, page 427; Biennial Report of the Attorney General, 1930-32, page 635; Biennial Report of the Attorney General, 1928-1930, pages 265 and 310; Biennial Report of the Attorney General, 1926-1928, page 730.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 8, 1950.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Counties—Tax Collectors—Attorneys—Taxation.

Tax collectors and county governing bodies have no authority to retain or employ attorneys, at county expense, to assist them in the collection of taxes on personal property when a delinquent taxpayer has left the county and has removed such property therefrom. Title 51, Section 219, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of June 12, 1950, is as follows:

"For the tax year 1949, taxes were assessed against certain personal property in Elmore County. This property consisted of various kinds of machinery which was moved out of this county into an adjoining county, and although the taxes were long past due, the taxpayer failed to pay them.

"Upon my request and that of the tax collector, a firm of lawyers in Wetumpka advised the tax collector of the necessary steps to enforce collection. These lawyers are the ones upon whom the County calls for all of its civil legal work, such as condemnation proceedings and other litigation that the county may be engaged in. These attorneys prepared all the papers necessary to enforce collection and it became necessary for them to do considerable work in tracing the machinery on which there was such lien for taxes. The papers were delivered to the tax collector of the county where the machinery was finally located and eventually the taxes paid, all as a result of the efforts of these attorneys. They incurred expense in this matter besides devoting considerable time thereto. Had it not been for their active participation in the matter, I am convinced that these taxes would have never been collected.

"The County would like, if it can legally do so, to pay these attorneys for their services and reimburse them for their expenses. Therefore, I would like to have your opinion on the following questions:

"(1) Under the circumstances, can the county legally pay a reasonable fee to these attorneys and reimburse them for their expenses on a claim duly presented to the Court of County Commissioners?

"(2) Should this claim be paid out of the general fund of the county, and if not, out of what fund should it be paid?"

Your first question is answered in the negative.

Under the provisions of Title 13, Section 229, Subdivision 8, Code of Alabama 1940, courts of county commissioners or boards of revenue may retain or employ attorneys when it is deemed advisable or necessary, and the agreed compensation to them may be paid as are claims to grand and petit jurors.

Subdivision 8, supra, has been construed to mean, however, that it confers upon courts of county commissioners and like governing bodies express power to retain or employ attorneys to represent the county in respect to county affairs **where that duty is not expressly delegated and imposed on some other officer.—State ex rel. Sossaman v. Stone, County Treasurer,** 235 Ala. 233, 178 So. 18.

Title 51, Section 219, Code of Alabama 1940, outlines in detail the duty of, and the procedure to be followed by, a tax collector when a delinquent taxpayer has left the county. The procedure therein provided is

routine and is mandatory upon the collector. That section contains no provision for the hiring of an attorney to assist the collector in the discharge of the collector's legal duty. On the contrary, it is apparent from the simplicity of the procedure that the statute contemplates that such taxes may be collected without the intervention of legal counsel and advice, that such forms and papers as may be necessary for a levy and sale of such property may be prepared in the collector's office, and that the collector himself shall trace and locate such property.

Since the duty of collection is expressly delegated and imposed on the collector, in my judgment there is no authority for payment, by the county, for legal services sought by and rendered to the collector during discharge of his statutory duty. **State ex rel Sossaman v. Stone, County Treasurer,** supra. Cf. Quarterly Report of the Attorney General, Vol. 23, page 191.

Your first question having been answered in the negative, your second inquiry is moot and requires no answer.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 14, 1950.

Hon. G. W. Hurst, Mayor,
Town of Chatom,
Washington County,
Chatom, Alabama.

Municipalities—Financial Institutions—Taxation.

Any town which becomes incorporated prior to September first of any year is entitled to participate in the distribution of the tax levied on financial institutions by Sections 426 and 427, Title 51, Code of Alabama 1940, for the year in which it is incorporated.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, dated July 14, 1950, is as follows:

"In February, 1949, the Town of Chatom, Alabama, was incorporated after an election was held to determine the sentiment of the voters within said town. Following the election which resulted in an overwhelming vote in favor of incorporation, the Judge of Probate in and for Washington County, Alabama, issued a decree declaring the said Town of Chatom to be an incorporated municipality. Within a few days after this said court decree was rendered a certified copy of the same was sent to the Secretary of State in Montgomery, Alabama, to be placed of record in that office.

"The Town of Chatom has not received any part of the distribution of the excise tax on financial institutions since its incorporation. We were advised by the State Department of Revenue that additional notice would have to be given to the Department before the Town of Chatom could participate in this revenue. During the early part of the year 1950 we furnished the information required of this Department and have been advised that the Town of Chatom will participate in the 1950 excise tax. But it is the contention of the Town of Chatom that this municipality was and is now entitled to participate in the 1949 excise tax and that the filing of copy of said decree of incorporation was sufficient notice to the Department of Revenue.

"Please render me your opinion on the question as to whether or not the Town of Chatom, Alabama, is entitled to participate in the distribution of the excise tax collected from financial institutions within the said town for the year 1949, bearing in mind that the distribution of such tax is made on September 1st of each year and that the Town of Chatom was incorporated in February of 1949.

"The State Department of Revenue has suggested that we request your official opinion on this matter before September 1, 1950, when the next distribution of this revenue is made."

My answer to your inquiry is in the affirmative.

It appears from the facts outlined in your letter of inquiry that the Town of Chatom was duly incorporated sometime during the month of February, 1949, and the certificate of incorporation was duly certified to the Secretary of State, and placed on record in that office.

Title 51, Sections 426 and 427, Code of Alabama, 1940, levy an excise tax on all financial institutions which come within the purview of said sections.

Title 51, Section 429, Code of Alabama 1940, as amended by Act No. 547, General Acts 1943, page 536, provides for the distribution of the taxes so levied on said institutions. Said section provides that on the first day of September, 1936, and on the first day of each September thereafter, the tax levied by these sections shall be distributed in the following manner: On the certificate of the Department of Revenue that a municipal corporation is entitled to participate in the distribution of this tax, the comptroller shall draw his warrant in favor of the municipal corporation in which such financial institution is located for an amount equal to one-half of the tax received from the institution located in such municipality. There is no provision in any of the sections mentioned hereinabove providing that a town must be incorporated before a given date before it can participate in the distribution of this tax.

It, therefore, necessarily follows that if a municipality is in truth and in fact an incorporated municipality on September first of any year, it is entitled to participate in the distribution of this excise tax.

It is my opinion that the filing of the certificate of incorporation in the office of the Secretary of State in Montgomery, Alabama, and there recorded by the Secretary of State, was sufficient notice to the Department of Revenue that the Town of Chatom had become incorporated during the month of February, 1949, and, therefore, it was entitled to participate in the distribution of the excise tax, when said distribution was made by the Department of Revenue on September 1, 1949.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 15, 1950.

Hon. R. L. Malone,
Judge of Probate,
Limestone County,
Athens, Alabama.

Privilege Licenses—Census—Reclassification.

In accordance with the provisions of Title 1, Section 14, Code of Alabama 1940, the reclassification date for determining the amount of license rated according to the population of a town, city, or county, will be August 6, 1951, this being the ninetieth day following the first day of the first regular legislative session held next after the publication by the Federal Government of the regular decennial census.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 24, 1950, is as follows:

"As you know for the past ten years, we have been selling Privilege Licenses for Town and City, based on population of 1940.

"Now, I have just received a Preliminary Announcement of the census for 1950. I want to know if I am to sell licenses based on this preliminary on October 1, or shall I wait until the Official census is issued from Washington?"

For answer to your inquiry, I call your attention to the provisions of Title 1, Section 14, Code of Alabama 1940, which provides as follows:

"§ 14. Re-classification date.—The ninetieth day after the first day of the first regular legislative session held next after the publication by the federal government of the regular federal decennial population census for Alabama is hereby fixed as the date for any

reclassification under any law requiring classification based on such said census."

In view of this statute, it appears that the reclassification date for determining the amount of license when same is rated according to the population of a town, city, or county, will be on the ninetieth day after the first day of the next regular session of the Alabama Legislature held in 1951. See in this regard Quarterly Report of Attorney General, Vol. 20, page 351; Quarterly Report of Attorney General, Vol. 30, uage 86.

It is provided by Amendment LVII, Constitution of Alabama 1901, proclaimed ratified November 14, 1946, that the Legislature shall convene in regular session on the first Tuesday in May, 1947, and on the first Tuesday in May in each second year thereafter. Under this amendment, the regular session for 1951 will convene upon May 8, 1951. According to my computation, the ninetieth day following such date of convening falls upon August 6, 1951. In my opinion, such is the date upon which the probate judges should commence the issuance of licenses based upon the last preceding U. S. census, the census for 1950.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 16, 1950.

Hon. W. H. Holcombe, Sheriff,
Mobile County,
Mobile, Alabama.

Sunday Laws—Alabama Alcoholic Beverage Control Board —Intoxicating Liquors.

The sale or consumption of alcoholic malt or brewed beverages on Sunday in a club as defined in Title 29, Section 1, Code of Alabama 1940, the facilities of which are not open to the public generally but restricted to club members and their invited visitors, is not prohibited.

Opinion by Assistant Attorney General Johnson.

Dear Sir:

Your request for an official opinion bearing date of June 30, 1950, is as follows:

"This Department has been engaged in an effort to prevent the sale and consumption of alcoholic beverages on Sunday in this County. This effort applies to licensed clubs as well as other establishments.

"In the opinion of the writer, the consumption of liquor in a restaurant or other public place is a violation of the law.

"With reference to licensed clubs we are confronted with the question of whether or not such a place is a public place.

"Your opinion is respectfully asked in this matter."

The term "club" is defined in Title 29, Section 1, Code of Alabama 1940, as follows:

"The term 'club' shall mean a corporation or association organized or formed in good faith by authority of law, and which must have at least one hundred fifty paid-up members. It must be the owner, lessee or occupant of an establishment operated solely for the objects of a national, social, patriotic, political, or athletic nature, or the like, but not for pecuniary gain, and the property as well as the advantages of which belong to all the members and which maintains an establishment provided with special space and accommodations where in consideration of payment, food with or without lodging is habitually served. The club shall hold regular meetings, continue its business through officers regularly elected, admit members by written application, investigation and ballot, and charge and collect dues from elected members."

It is significant to note that all through the chapter dealing with liquor licenses the Legislature, when desiring any section to apply to clubs, included them by specific reference. Thus, in Title 29, Section 13, Code of Alabama 1940, wherein authority was given the Alcoholic Beverage Control Board to grant licenses to certain persons or places of business, the Legislature said:

"... shall have authority to issue a liquor license for any premises kept or operated by a hotel, restaurant or club and specified in the license, entitling the hotel, restaurant or club to purchase liquor from an Alabama liquor store and to keep on the premises such liquor...."

Again, in Title 29, Section 14, Code of Alabama 1940, the Legislature said:

"Every applicant for a hotel liquor license, restaurant liquor license, or club liquor license shall file a written application with the board...."

The same specific reference to clubs is also found in Sections 15, 17, 21 and 22, and throughout the chapter.

However, in Act No. 102, General Acts 1949, page 130 (Title 29, Section 36(1), 1949 Cumulative Pocket Part, Code of Alabama 1940), which is the provision of law prohibiting the sale or consumption of any alcoholic, malt or brewed beverage on Sunday, the Legislature did not include

the word "club." Act. No. 102, supra, is here quoted in pertinent part as follows:

> "Section 1. Any group who gives away, sells, serves, or drinks any alcoholic or malt or brewed beverage in any cafe, lunch room, restaurant, hotel dining room, or other public place on Sunday is guilty of a misdemeanor....
>
> "Section 2. The proprietor, keeper, or operator of any cafe, lunch room, restaurant, hotel dining room, or other public place who knowingly permits any person to give away, sell, serve, or drink any alcoholic or malt or brewed beverage on the premises of such cafe, lunch room, restaurant, hotel dining room, or other public place on Sunday is guilty of a misdemeanor...."

It seems clear to me that the Legislature did not intend to prohibit the sale or consumption of alcoholic, malt or brewed beverages on Sunday on the premises of club licensees as defined in Title 29, Section 1, supra. This is manifested by its specific use of the term "clubs" in all pertinent sections of Title 29 and its omission of the term "clubs" in Act No. 102, supra.

As to whether a club is or is not a public place has not been clearly determined by the Courts of this State, and much would depend upon the nature of the establishment under consideration. However, a "public place" is defined in Words and Phrases, Vol. 35, page 268, as follows:

> "A 'public place' is, generally speaking, a place openly and notoriously public; a place of common resort; a place where all persons have a right to go and be; a place which is in point of fact public, as distinguished from private; a place that is visited by many persons and usually accessible to the neighboring public...."

It has also been held by the Court of Criminal Appeals of Texas that the rooms of a club are not a public place. The language used by the court is as follows:

> "The rooms of a commercial club, to which only the club members and invited visitors are admitted except when the club has under discussion some question affecting the public interest, are not a public place within the meaning of the statute prohibiting card playing in public places. **Grant vs. State,** Court of Criminal Appeals of Texas, 27 S. W. 127, 33 Tex. Crim. Rpts. 527.

The Alabama Alcoholic Beverage Control Board on the 31st day of March, 1948, promulgated a rule and regulation prohibiting, among other things, the sale of any alcoholic beverages on Sunday. Said rule and regulation is here quoted as follows:

> Effective immediately all persons, firms, corporations, or associations of persons, holding a license issued by the Alabama Alcoholic

Beverage Control Board, are hereby prohibited from exchanging, bartering, trading, giving or selling any and all alcoholic beverages between the hours of 2:00 A. M. and 8:00 A. M. each day. Provided, however, there shall be no sale between the hours of 12:00 midnight on any Saturday and 8:00 A. M. the following Monday.

"Any licensee found guilty of violating this regulation subjects his licenese to revocation." Regulation No. 6 (1948).

Such rule and regulation, while it may have been valid in all respects at the time of its promulgation, is now contrary to law, and is void and of no effect insofar as it relates to sales, etc., on Sunday. Since the Legislature has seen fit to regulate the sale of alcoholic beverages on Sunday in this State, the Alabama Alcoholic Beverage Control Board is without authority to promulgate rules and regulations contrary to the intent and purpose of Act No. 102, supra.

The following statement in regard to the power of administrative authority to enact rules and regulations is found in 42 Am. Jur., Public Administrative Law, Section 49:

"The Legislature, having declared its policy and purpose and provided standards for the exercise of the power, may confer upon administrative authorities the power to enact rules and regulations to promote the purpose and spirit of the legislation and carry it into effect, . . . The authority to make rules to carry out a policy declared by the lawmaker is administrative and not legislative, . . . Such power is not the power to make law, but the power to carry into effect the will of the lawmaker as expressed by the statutes . . . However, the delegation of power to make rules and regulations cannot extend to the making of rules which subvert the statute reposing such power, or which are contrary to existing laws, . . ."

While it is true that the Alabama Alcoholic Beverage Control Board is authorized by Title 29, Section 6, Code of Alabama 1940, to make regulations necessary to carry out the provisions of the Act, its authority to do so is limited to promulgating "such regulations not inconsistent with this chapter as it shall deem necessary for carrying out the provisions of this chapter."

Regulation No. 6, supra, is to the extent indicated, contrary to the intent and purpose of Act No. 102, supra, and, as heretofore stated, to that extent, is void and of no effect.

It is my conclusion that the sale or consumption of alcoholic, malt or brewed beverages on Sunday in a club, as defined in Title 29, Section 1, Code of Alabama 1940, the facilities of which are not open to the public

generally, but are restricted to club members and their invited visitors only, is not prohibited in this State.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1950.

Hon. J. G. Hosey, Chairman,
Board of Registrars,
Jefferson County,
Birmingham, Alabama.

Boards of Registrars — Election Precincts — Voting Places — Jefferson County.

1. Duties, power and authority of the Chairman of the Board of Registrars of Jefferson County are found stated within Title 17, Section 56, Code of Alabama 1940, as amended in certain respects by Act No. 668, General Acts 1947, page 509.

2. Under Title 17, Section 34, Code of Alabama 1940, the registrars sit and act as a board, and nothing done by an individual member has any force or validity until approved and adopted by a majority of the board. The power and authority of the associate members of the board, as it relates to the registration of voters, is commensurate with that of the Chairman.

3. None of the members of the Board of Registrars, individually or as a board, exercise any authority with respect to the rearrangement of the precinct lines of the county or the location of voting places within such precinct, this being a matter addressing itself to the governing body of the county.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 9, 1950, is as follows:

"Subject: Title 17 Section 24 and amended Sept. 1947: Section 34 and 56 Code of Alabama 1940 Act 668 House Bill 760 approved by Governor Oct. 8, 1947, page 509 and Article 6 of Title 17, Code of Alabama 1940.

"I wish to submit the following questions pertaining to this office.

"1. What are the duties, powers and authority of the Chairman of the Board of Registrars of Jefferson County?

"2. Do the associate members have equal duties, power and authority as the chairman in the office in regard to official business of the office, other than the hiring of clerks to carry on the work of the office?

"3. Do the associate members have the power and authority to instruct the employees to perform duties other than those regarding the registration of voters?

"4. Do the associate members have the power and authority to change or prevent the changing of precinct lines and voting places?

"5. Is the authority of changing precinct lines and voting places vested only in the chaiman of the Board of Registrars and the governing Board of the County?

"I shall appreciate an early reply to this letter as there are contemplative changes in certain precinct lines and voting places and it is necessary for each of the members of the Board to know his specific authority in this matter.

"I am writing this letter after discussion with the Solicitor's office and they suggested that I write you for an opinion on the above questions."

The duties, power and authority of the Chairman of the Board of Registrars of Jefferson County are to be found enumerated within Title 17, Section 56, Code of Alabama 1940. The language of this statute is clear and unambiguous upon this particular point and no further elaboration thereon is here necessary. It is true that this particular statute has been affected to some extent by the passage of Act No. 668, General Acts 1947, page 509, but in no respect pertinent to your inquiry other than that to be found set out below in my answer to your second inquiry.

In answer to your second question inquiring as to the power, authority and duties of the associate members of such Board of Registrars, I would refer you to the provisions of Title 17, Section 34, Code of Alabama 1940, which provides as follows:

"The action of a majority of the board of registrars shall be the action of the board, and a majority of the board shall constitute a quorum for the transaction of all business."

The provisions of this statute are plain and unambiguous and not subject to construction, and simply mean, in my opinion, that it requires a majority of the Board of Registrars to perform the duties of the board. The registrars sit and act as a board, and nothing done by an individual member has any force or validity until approved and adopted by a

majority of a board. It is effective then because it then becomes the act of the board. Biennial Report of Attorney General, 1920-22, page 15. It is, therefore, my opinion that the members of the Board of Registrars, chairman and associate members alike, in carrying into effect the laws of this State as they relate to the registration of voters, are vested with equal and commensurate authority and their acts are those of a board rather than those of individual members.

I note that in such inquiry you except therefrom the matter of the hiring or employment of clerical personnel for the board. In this regard, it is my opinion that, in view of the provisions of Section 5, Act No. 668, supra, this also is a duty or prerogative resting with the board as a whole rather than with the chairman thereof as an individual. It is true that under the provisions of Title 17, Section 56, supra, the matter of the employment of such clerical personnel was vested solely in the chairman of the board. However, such is not true under the terms of Act No. 668, supra, which specifically states that:

> "Section 5. The chairman and members of the Board of Registrars in such counties shall have the power and authority to employ a chief clerk and other clerical help, including a secretary, as may be necessary for the efficient discharge of the duties of said Board, provided that the Board of County Commissioners, or Board of like jurisdiction, shall have authority to determine the number of classification of such employees, subject to the provisions of any Merit System which may be in effect in said county, and provided further that all of said employees of said Board shall be appointed under and in accordance with the provisions of any Civil Service Act governing the classified employees of said county."

In my opinion, this latter enactment now governs the employment of such personnel, and such is now a matter addressing itself to the board as a whole.

With reference to your third inquiry, I find myself unable to give answer thereto due to the fact that I fail to understand the subject of inquiry there presented. In the absence of such specificity as admits of answer, I must decline to offer any comment as to such inquiry. If you will advise with certainty the matters you there have in mind, I will render you my opinion regarding same.

With reference to your two latter inquiries regarding the rearrangement of the precinct lines of the county, as well as the location of the polling places within such precincts, I must advise that such is of no concern to the Board of Registrars of the county and that such board exercises no authority with reference thereto, such being a matter addressing itself solely to the governing body of the county concerned. See in this regard Title 17, Article 6, Code of Alabama 1940, as well as Act No. 655, General Acts 1947, page 505. I fail to find wherein the general law in this regard is any the less applicable to Jefferson County, therefore, I

must conclude that the Board of Registrars is without authority in this premise.

In reaching the above conclusion, I have not given consideration to any local or general act specially applicable to Jefferson County inasmuch as diligent research fails to disclose any such enactment and none have been called to my attention by your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1950.

Hon. C. G. Chason,
Town Attorney,
Town of Foley,
Baldwin County,
Foley, Alabama.

Municipal Corporations—Public Improvement Assessments.

If a municipal corporation imposes a public improvement assessment against any of the lots or parcels of land enumerated in Title 37, Section 526, Code of Alabama 1940, it must make such assessment against all of the lots or parcels of land therein set out.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of December 30, 1949, is as follows:

"The Town of Foley wishes an interpretation of Section 526 of Title 37 of the Code of 1940, wherein this section states that the costs of paving or improving intersections or alleys 'may' be assessed against lots or parcels of land abutting on each of the streets or alleys or a half block in each direction therefrom.

"Under a proposed paving plan of the Town of Foley, the Town desires to assess the cost of paving intersections and alleys equally against the owners of the lots abutting on the street to be paved and to make no assessment against the owners of lots not abutting on the streets to be paved. In other words, they contemplate finding the total costs of the paving and the amount of footage of property to be assessed and dividing the cost equally on a footage basis, including therein the costs of street intersection and paving where the alley intersects the street.

"Inasmuch as Section 526 says that the costs may be charged against the owners within a half block radius, does this require that this mode of assessment be used or may the city assess as above set out on the grounds that the property abutting will be that benefiting from the street intersection and alley entrance paving?"

In answer to your request, you are advised that, under the provisions of Title 37, Section 526, Code of Alabama 1940, the Town of Foley may not make a municipal improvement assessment for paving certain intersections within the town only against the lots or parcels of land actually abutting on the intersection of the streets and alleys to be paved. Said section reads as follows:

"§ 526.—Where the intersections of streets, avenues, alleys, or other highways are improved, the cost of improving any intersection, or any part thereof, may be assessed against the lots or parcels of land abutting on each of the streets, avenues, alleys, or other highways so intersecting for a half block in each direction therefrom; provided, that for the purpose of computing assessments under this section, no block shall be considered as extending more than one thousand feet from any intersection so improved."

If it were not for the above-quoted Code section, the municipal corporation would not have authority to make a public improvement assessment, for the improvement of intersections, against anyone. This section provides that the municipal corporation **may** assess the cost of improving any intersection, or any part thereof, against the lots or parcels of land abutting on each of the streets, avenues, alleys, or other highways so intersecting **for** a half block in each direction therefrom.

It is my opinion that by the use of the word "may" the Legislature intended that the municipal corporation could either bear the whole expense of the improvement itself, or it could impose the cost of such improvement, or any part thereof, against the lots or parcels of land abutting on such streets, alleys, etc., so intersecting for a half block in each direction therefrom.

I do not think that by the use of the word "may" the Legislature intended that the municipal corporation could place the whole burden of such improvement against the lots or parcels of land actually abutting or touching the intersections improved, or the paving where an alley intersects the street. In my opinion, to assess only the owners of these lots or parcels of land which actually touch such intersection would be a denial to them of due process of law, this for the reason that the Legislature intended that all property owners within a half block of such intersection in each direction therefrom should bear the cost of such improvement.

It is to be specifically noted that the above-quoted Code section provides that for the purpose of computing such assessments, no block shall be considered as extending more than one thousand feet from any inter-

section so improved. This, to my mind, is evidence of the fact that the Legislature in granting this permission to make municipal assessment against such property owners, contemplated that all of the property owners within one thousand feet from any intersection improved would benefit just as much as the property owner whose property actually abutted upon the improved intersection, and should be assessed accordingly.

You are, therefore, advised that if the Town of Foley makes any assessment under this section, it must assess all of the property owners of lots or parcels of land abutting on the intersection so improved for a half block in each direction therefrom.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1950.

Honorable H. A. Jones,
Mayor, Town of Ariton,
Dale County,
Ariton, Alabama.

Ad Valorem Taxes—Homestead Rights—Tax Sales.

The death of life tenant or termination of the right of occupancy under homestead rights of widow and minor children does not subject the interest of the remaindermen or reversioners in real property to taxes assessable against the parties having such homestead interest in the property, nor does the lien of such taxes attach against the remainder or reversionary interest during the time of the right of occupancy by said parties entitled to said homestead rights.

Where the interest of the parties having the right of occupancy under the homestead rights have been sold to the State for taxes chargeable against such interest, the State acquires only the interest of such parties, which would terminate upon the expiration of said occupancy, and would not affect or encumber the interest of the remaindermen or reversioners.

Where States acquires interest of parties having the right of occupancy under homestead rights at a tax sale, and the property is listed in the name of State for the tax year beginning October 1, 1949, the property should continue to be so listed during the entire tax year ending September 30, 1950, regradless of the fact that such homestead rights expired in November, 1949, or prior to the end of said tax year, and even though the State's interest in said property ended when such homestead rights ended.

Where property is listed for property taxes on the tax assessor's list in the name of person having a taxable interest in property on October 1, of any given tax year then to the extent of such interest, said property must continue to be listed in the name of that person for the entire tax year ending on September 30.

General discussion of certain incidents of the homestead rights of widow and minor children, as they relate to the assessment and collection of ad valorem taxes.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of April 5, 1950, is as follows:

"Will you please advise me about the taxes on the Estate of Mrs. W. C. Houston, who died in **November 1949** and **taxes are delinquent since 1929,** on **one dwelling House** and **6 acres of land** here in Ariton. Section 10, Township 7, and Range 23. **Mrs. Houston was heir** to this home as long as she lived, but at her death the estate reverted back to the **G. T. Weed Estate and Heirs,** who are offering the property for sale.

"Did the tax which are delinquent die, when Mrs. Houston died? Or, can the State of Ala. collect the full tax claim of 20 years? Or, can the estate be reassessed for 5 years back and settled. Please advise me by return mail."

Further information which you have given me from time to time is to the effect that Mrs. W. C. Houston was at the time of the death of G. T. Weed, Mrs. G. T. Weed, and that he left surviving him at such time her as his widow and two minor children, together with ten adult heirs. It also appears that Mr. Weed died intestate during the year 1929 and that one of the minor children who has been referred to was unborn at the time of his death.

It would also appear that Mrs. Weed, who later married W. C. Houston and who will be hereinafter referred to as Mrs. Houston, took over the property involved after Mr. Weed's death in 1929 and lived on it claiming it as her homestead continuously from 1929 until her death in November 1949.

The records show that this property was last assessed for taxation in the year 1930 at which time it was assessed in the name of Mrs. Willie or W. C. Houston, and that the property was sold to the State of Alabama on September 15, 1931, for 1930 taxes, and has never been redeemed. The records further show that the interest so sold to the State for 1930

taxes has remained in the State, as the State has never sold the property to a third party or executed a deed thereto.

You also have stated to me that there is no record in your County of any court proceeding whereby the property was ever by a court determined to be the homestead and set apart as such to the widow or minor children as a homestead, either jointly or severally.

We also presume from what you have stated that the property involved was all of the real estate owned by Mr. Weed at the time of his death and that it did not at that time exceed in acreage 160 acres or in value $2,000.00.

If the foregoing information is correct, then it appears that under the law existing at the time of Mr. Weed's death in 1929 (Sections 7918 and 7920 of the Alabama Code of 1923), the widow and the two minor children would have had a homestead right in the property involved; that is, a right of occupancy in the widow for life, and in the minor children for the duration of their minority.

This right of homestead in the widow and minor children of a deceased, and under the circumstances as provided therein, has been a part of our laws for a considerable time prior to the adoption of Sections 7918 and 7920, **supra**, and the Alabama Code of 1923. Also these sections of the 1923 Code have been brought forward without any material change in the 1940 Code as Sections 661 and 663 of Title 7, and are therefore still the law on this subject.

The intention of the Legislature, as manifested by various statutes on the subject, seems to have been to provide a home for the family of a decedent, during the lift of his widow and the minority of his children, and each child as it arrives of age, ceases, in cases of the solvency of the estate, to have such homestead rights therein, but in the event of the estate being declared insolvent, the widow, together with the children who were at the time of the death of their father under age, shall take the homestead in absolute right and in fee simple. **Miller v. Marx**, 55 Ala. 322, 323, **Smyly v. Chisenhall**, 108 Ala. 682, 18 So. 739, 740.

If the homestead right is a right of occupancy, in the widow for life, and in the minor children for the duration of their minority, upon the termination of such homestead interests, the property reverts back to the estate of the deceased husband, and usually to his adult heirs in fee simple. **Miller v. Marx, supra.**

The minor children, each upon becoming twenty-one years old, and after the cessation of their homestead right of occupancy for the duration of their minority, would become an adult heir, and as such would be entitled to an heir's share in fee simple in the property.

In order for the homestead to vest absolutely in fee to the widow and minor children under said statutes, where the question of insolvency

arises, the question must be judicially determined by a court of competent jurisdiction. If such a determination by the court is not made, then the widow and minor children would have only the right of occupancy of the homestead for the time heretofore described. **McDuffie v. Morrisette**, 184 Ala. 360, 63 So. 542.

Under section 7920 of the Alabama Code of 1923, which is now section 663 of Title 7, Code of Alabama 1940, when the property involved is all of the real estate of the decedent at the time of his death, the title to such homestead vests absolutely in the widow and minor children, whether there be an administration of the estate of the decedent or not. This, however, does not apply when the decedent has in addition to his widow and minor heirs, also adult heirs. In that case the homestead would not vest absolutely in fee simple in the widow and minor heirs, unless it is judicially determined by a court of competent jurisdiction that the property involved is all of the real estate left by the decendent and at the time of his death it did not exceed in value more than $2,000.00 and in acreage 160 acres. **Franklin v. Scott**, 227 Ala. 101, 148 So. 833.

There also appears to be no time limit during the life of the widow or minority of any of the minor children, for the instigation of such proceedings in a proper court, after sixty days from the time of the death of the deceased husband, and where there has been no administration on his estate. **Buchannon . Buchannon**, 220 Ala. 72, 124 So. 113; and **Faulk v. Boutwell**, 242 Ala. 526, 7 So. (2d) 490.

The foregoing principles are set forth by me in this opinion in view of the fact that it is necessary in order to properly answer your questions to determine first whether the widow and minor children have in the property involved an absolute or fee simple title, or whether their interest under said statutes is the homestead right of occupancy of the widow for her life and of the minor children for the duration of their minority. If it is determined that the title to the property involved was vested in the widow and the minor children in fee, then an entirely different situation would arise, which would give rise to questions which would have to be answered in an entirely different way.

If, however, the information which you have given us is correct, then it would appear that all that Mrs. Houston and the two minor children would have had in the property under their homestead rights would be a right of occupancy in the premises for the life of Mrs. Houston and in the case of said minors for the duration of their minority. In order words, when each of the minors became of age, their right of occupancy ceased, as Mrs. Houston's interest did at the time of her death. I shall, therefore, attempt to answer your questions on that assumption.

With reference to your question as to whether or not the taxes which were due and payable on the interest of Mrs. Houston and the minor heirs are chargeable to the remaindermen after the termination of said life interest and right of occupancy of the minors for the duration of their minority, I am of the opinion that taxes which became due or which

accrued during the term or duration of said homestead interests would not be chargeable upon the termination of such interests to the remaindermen or reversioners. The lien of said taxes as against the property involved was terminated upon the death of Mrs. Houston, as the life tenant and upon said minors becoming of age, and thus would not encumber the remainder interest or fee title to the property belonging to the remaindermen or reversioners. Biennial Report of Attorney General 1936-1938, page 629; Quarterly Report of the Attorney General, Volume 54, page 166; **State v. Clark, et al**, 240 Ala. 362, 199 So. 543.

This would still be the case even though the property was sold to the State for taxes on September 15, 1931. The property having been assessed at that time in the name of the life tenant, Mrs. Houston, and also presumably for the minor heirs, under the homestead rights, then the State would only take at such tax sale such interest as those who were liable for the payment of said taxes had in said property at such time. The interest of the remaindermen or reversioners or the fee interest, which was then subject to said life estate and said homestead interests, was not affected or encumbered by the tax sale. Quarterly Report of Attorney General, Volume 54, page 166; **State v. Clark**, supra; **Gunter v. Townsend**, 202 Ala. 160, 79 So. 644; and **Barkley v. Mathews**, 227 Ala. 557, 149 So. 826. Therefore, if the facts which have been submitted in this case are to be taken as true, the title to the property involved to the extent of the interests of the widow and minor heirs through the homestead rights, was vested in the State of Alabama by virtue of the tax sale to the State on September 15, 1931, and from that date until the time of the termination of such homestead interests. This is particularly true as the records show that the property was assessed in the name of Mrs. Houston for the tax year 1930, the year for which the property was sold for taxes. Mrs. Houston's interest in the property terminated when she died in November 1949. It also would appear that the two minors to whom you refer have now become of age, which would also serve to terminate their right of occupancy in the property. However, this is not made clear by the facts given by you, and if one of the minor heirs has not become of age, then he would still be entitled to the right of possession and occupancy of the premises until he does reach the age of 21. As Mrs. Houston, who held the property for life, died in November 1949 and as the 1950 tax year had already commenced on October 1, 1949, and would run through September 30, 1950, for tax purposes, the tax assessor should still list the property as property sold to the State through the entire 1950 tax year. This would also particularly be true in view of the fact that if either of said minor heirs has not reached his majority, then, of course, he would still have the right of occupancy in the property. If such be the case and if such minor reaches the age of 21 before 12:00 p.m. on September 30, 1950, the time when the present tax year ends, all rights of occupancy in the property would be terminated, and title to the property would vest in the remaindermen. Then the remaindermen should begin to assess the property for the tax year commencing October 1, 1950, and running through September 30, 1951. However, if one of the parties involved is still a minor on October 1, 1950, then the property would not vest in the remaindermen, in time for them to assess the property during the tax year

October 1, 1950, through September 30, 1951. This is true because of the fact that after the tax year has started to run on October 1 of any given year, then it could not thereafter be lawfully split up, and for tax purposes the property should remain for the entire tax year involved listed in the name of the party who is chargeable with the payment of taxes on October 1. The case of **United States v. State of Alabama,** 313 U. S. 274, 61 S. Ct. 1011, expressly forbids the splitting up of a tax year after such tax year has begun to run on October 1 of any given tax year.

The foregoing is true even though the life tenant died in November 1949, and even though at the time of her death the two minors involved might have already reached their majority. Thus, the remaindermen or heirs of G. T. Weed, could not lawfully assess the property in their names either under Title 51, Section 37, Code of Alabama 1940, or as an escape under Section 53 of the same title for the tax year commencing October 1, 1949, and ending September 30, 1950, and if an assessment has been made by the tax assessor, then it has been made through error and the tax collector should show it as an error on his books as he is authorized to do under Title 51, Section 209, Code of Alabama 1940.

If before October 1, 1950, the two minor heirs of G. T. Weed have reached the age of 21, then the title to the property would have vested in the heirs of G. T. Weed as the remaindermen and for tax purposes they would be liable for the payment of the taxes for the 1951 tax year, and the property should be assessed in their name for that year.

Under those circumstances the lien of the taxes would not attach as against the interest of said remaindermen until October 1, 1950, nor would they be due to pay any taxes on said property until October 1, 1951, as taxes for the year 1951 would not be due and payable until that date. The remaindermen would not be liable for the payment of the taxes which accrued against the property during the life of Mrs. Houston or right of occupancy in the minor heirs, before they reached the age of 21. This would also include the time during which the interest of said widow and minor heirs was held by virtue of the tax sale by the State. The interest of the remaindermen or heirs would also be free from all tax liens which attached against the interests of the widow during her lifetime, and the minor heirs, during their minority, as such liens would terminate upon the expiration of their said homestead interests. The interest of the State of Alabama in said property acquired through said tax sale would also end with the termination of said homestead rights.

This being the case, it is not deemed necessary to give any serious consideration at this late date to the possibility that at the tax sale in 1931 the State only acquired the life interest of the widow in the property, and might not have acquired the occupancy rights of the two minors, for when the heirs who were minors at the time of G. T. Weed's death have reached their majority, the State will have all of its rights to enforce any claim or lien against the property involved for taxes which are chargeable to, or which have accrued against said widow or minors,

while they were entitled to said rights of occupancy under their homestead rights, and this would not cause me to alter in any way the answers I have already given to your questions.

There is also no necessity to consider in this particular case the exemption accorded by Title 51, Section 15, Code of Alabama 1940, as that law (Act No. 108, Extra Session 1936 through 1937, page 113), was not approved until February 30, 1947 and did not become operative until the 1936 through 1937 tax year. In Re Opinion of the Justices, 234 Ala. 358, 175 So. 690. Also there is no evidence in this case that any claim to the exemption under Section 15, **supra**, was ever asserted.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1950.

Hon. R. P. McRee,
Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery 2, Alabama.

Alabama Alcoholic Beverage Control Board—Leases.

Under the terms of the lease entered into by the Alabama Alcoholic Beverage Control Board for the rental of a building in Homewood, Alabama, to be occupied as a State Liquor Store, it was the duty of the Board to purchase and install the gas heater and the payment of the purchase price and cost of installation by the Board was proper.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion dated July 14, 1950, as amended by your letter of August 1, 1950, is as follows:

"The ABC Board entered into a lease with Clyde F. Weaver on April 29, 1946, for a building to be occupied as a State Liquor Store, Number 15, in Homewood, Alabama, which lease was amended on September 12, 1946, by the addition of paragraphs (4) and (5) of Section A, copy of which amended lease is attached.

"Subsequent to the execution of the amended lease, the ABC Board contracted with Weaver Realty Company to install in the leased building one 75000 BTU unit heater complete, with wiring, pipe and necessary vent complete, for the sum of $438.00, which the ABC Board paid on proper purchaser order, etc.

"Please give us your written opinion as to whether, under the lease contract and especially paragraph (4) of the amended lease, it

was the duty of the lessor to furnish and install the BTU heater complete, or whether the installation of the heater was the responsibility of the ABC Board, and the payment by the said ABC Board of the sum of $438.00, the purchase price and installation of the same, was proper.

"Your prompt reply to this request as amended will be appreciated."

The only provisions of the lease that need be considered in answering your inquiries are those contained in Paragraph A. (3), (4) and (5), which are as follows:

"(3) Lessor agrees to put said building in condition suitable for the purposes of the Lessee, and throughout the term of this lease agrees to maintain a safe building and keep the premises in good condition and repair, including necessary repairs to roof, gutters, downspouts, and skylights; and also agrees to be responsible for all breakage or leakage of water pipes below ground, and stoppage of waste pipes or sewers, and further agrees to be responsible or sewers, and further agrees to be responsible for breakage of plate and other glass; except where these conditions are caused by the negligence of some representative or employee of the Lessee; all of said repairs and/or improvements are to be made by and at the expense of Lessor.

"(4) In addition to the repairs and improvements as specified in Paragraph (3), Lessor agrees to be responsible for the upkeep and maintenance of any specific equipment in connection with the building, such as exhaust or blow fans, heaters, and light fixtures.

"(5) Lessor agrees to pay all charges for water, electricity for lights and fans, and gas for heating purposes, used in the premises during the term of this lease."

"As in the case of contracts generally, a cardinal principle in the construction of leases is to give effect to the intention of the parties as manifested by the words used. A court is not at liberty to read into a lease a meaning which the parties did not intend, or which they did not express in the language used, and should, if possible, interpreting the language used, give each word or phrase its ordinary meaning, in a business sense, at the time the lease was made. * * * "

"If a lease contains ambiguous and uncertain provisions, the court may, in construing it and in ascertaining its true meaning, look to the interpretation that the parties, in the performance of the lease, have placed on such provisions. Indeed, where the parties to a lease have placed a given construction upon the ambiguous provisions thereof and have governed their conduct in accordance with their construction, such construction will be given great weight and should, ordinarily, control the interpretation of the contract by the court. * * * " 32 Am. Jur. Landlord and Tenant, Section 127, page 130.

There is no provision of the lease which specifically provides that the lessor must install the gas heater under consideration. The question which is then presented is whether or not the agreements on the part of the lessee to put the building in condition suitable for the purposes of the lessee (Paragraph 3, supra), to keep the heaters in repair (Paragraph 4, supra), and to furnish gas for heating purposes (Paragraph 5, supra) would obligate the lessor to install the gas heater. It is my conclusion that such agreements do not obligate the lessor to install the gas heater. If it had been the intention of the parties that the heater was to be installed by the lessor, then why did the Alabama Alcoholic Beverage Control Board contract for the purchase and installation of the heater and pay for the same, rather than requiring the lessor to do so? This action on the part of the Board is a strong indication that in interpreting the lease the Board considered it its duty rather than the duty of the lessor to install the heater.

In view of the above conclusions, it is my opinion that under the terms of the lease, it was the duty of the Board to install the heater and that the payment of the purchase price and cost of installation by the Board was proper.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 23, 1950.

Hon. Tom C. Garner,
Judge of Probate,
Jefferson County, 113 Courthouse,
Birmingham 3, Alabama.

Filing Tax—Taxation—National Banks.

Where a mortgage is made to a national bank as mortgagee, and the national bank assigns its interest as mortgagee to a third party which is not a national bank, a judge of probate may accept a filing tax for the privilege of re-recording this mortgage even though this mortgage has been previously recorded without payment of a mortgage filing tax.

The assignment from the national bank to the third party may not be recorded without payment of the deed filing tax.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of June 7, 1950, is as follows:

"Will you please give me your opinion with respect to the following situations which now confront me.

"Situation 1. A mortgage made to a national bank, as mortgagee, has heretofore been filed in and is recorded in this office, but the mortgage privilege recording tax was not, and has not been paid thereon. This mortgage has been purchased by a purchaser which is not a national bank, and which is not itself exempt from payment of the mortgage privilege recording tax on any mortgage which is made to it. This purchaser has received a written assignment of said mortgage, which assignment has been filed for record in this office heretofore and upon which the deed tax has been paid. The said purchaser of said mortgage now offers to rerecord the mortgage and pay the recording fee and mortgage tax thereon out of its own funds and for its own account, and not for the account of the said national bank. May I legally receive the payment of the mortgage privilege recording tax under these circumstances?

"Section 2. A mortgage made to a national bank, as mortgagee, has heretofore been filed in and has been recorded in this office, and the mortgage recording privilege tax has not been paid thereon. This mortgage has been purchased by, and a written assignment thereof executed and delivered to, a purchaser which is not a national bank and which is not exempt from the payment of the mortgage tax on mortgages made to it. Said purchaser now presents to me the said original mortgage for recordation and tenders the payment of the recording fee and the mortgage recording privilege tax on said mortgage, and also tenders the assignment of said mortgage to me for recordation offering to pay only the recording fee on said assignment. At the same time this assignee corporation tenders to me a written statement that it is paying the said mortgage tax for its own account, and not for the account, directly or indirectly, of the said national bank, the original mortgagee. May I accept the payment of the mortgage recording privilege tax under these circumstances, and may I also accept the said assignment of said mortgage for record without the payment of deed tax thereon? The order of acceptance and filing of the instruments would be first the mortgage, and then the assignments."

There appears to be nothing to prohibited a re-recording of a mortgage which had previously been recorded without payment of a mortgage filing tax because the mortgage had been made to a national bank as mortgagee, and therefore was not susceptible to the mortgage filing tax because the mortgage had been made to a national bank as mortgagee, and therefore was not susceptible to the mortgage filing tax.

However, I should like to call your attention to the opinion to you under date of April 19, 1950 (Mr.). I assume from your statement of facts in "Situation 1" that the assignment of the mortgage in question is a bona fide transaction, and is not merely a subterfuge to enable avoidance of the holding of the above-mentioned opinion. If there has been

a bona fide assignment of the interest of the national bank to the purchaser, then there is nothing to prevent your accepting a payment of the mortgage filing tax when the mortgage is offered for re-recordation.

The only difference between your "Situation 1" and your "Situation 2" is that in "Situation 2" there is an attempt to avoid payment of the deed filing tax when the assignment from the national bank to the purchaser is offered for record. The theory for such avoidance is that if the mortgage is re-recorded before the deed assignment is recorded, the transaction will come within the exemption in Title 51, Section 618, Code of Alabama 1940, where the instrument of transfer of mortgages upon which the mortgage tax has been paid may be recorded without payment of a deed filing tax.

There is no substance to this theory. The key date is the date on which the assignment was made. On this date, no mortgage filing tax had been paid for the privilege of recording this mortgage. See: Quarterly Report of the Attorney General, Vol. 17, page 317, which holds, in part, that the key date for determining the value of the interest conveyed is the date of recordation. That also is authority here. In addition, the opinions in Quarterly Report of Attorney General, Vol. 12, page 93, and Vol. 15, page 229, make it clear that the recording of an assignment of mortgage by a national bank to a third party, where no mortgage tax has been paid for the privilege of recording the mortgage, is subject to a deed filing tax.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 23, 1950.

Hon. John M. Gallalee,
President,
University of Alabama,
University, Alabama.

Taxation—Exemptions—Sales and Use Tax.

1. The sales of tangible personal property to the Department of Physical Education and Athletics of the University of Alabama are exempt from the sales tax levied by Title 51, Section 753, Code of Alabama 1940, such exemption being provided for in Title 51, Section 755(b), Code of Alabama 1940.

2. The storage, use or other consumption in this State of tangible personal property purchased at retail by the Department of Physical Education and Athletics of the University of Alabama is exempt from the tax levied by Title 51, Section 788, Code of Alabama 1940, such exemption being provided for in Title 51, Section 789(d), Code of Alabama 1940.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of March 30, 1948, is as follows:

"Will you please furnish me with your official opinion on the following proposition?

"Are purchases made by the University of Alabama's 'Department of Physical Education and Athletics,' and paid for out of the University's 'Physical Education Fund,' such purchases being not made for resale purposes, subject to the State's 2% sales and/or use tax?

"So that you may understand the background for this request, I am attaching hereto copies of correspondence with Hon. Albert Pitts, Chief, Sales and Use Tax Division of the State's Department of Revenue, as follows:—

"(a) Letter from Mr. Pitts, dated March 16, 1948.

(b) My reply thereto, dated March 22, 1948, to which is attached excerpt from Minutes of our Board of Trustees, explaining the setup of our said Department of Physical Education and Athletics.

"(c) Letter from Mr. Pitts replying to my letter of March 22, suggesting we obtain a ruling from you in the matter.

"For your information the 'Physical Education Fund' is made up of student fees and gate receipts from athletic contests.

"Please call on me for such further information as you may require."

The law is clear that the gross proceeds of sales of tangible personal property to the State of Alabama are exempt from the sales tax levied by Title 51, Section 753, Code of Alabama 1940, and from the use tax levied by Title 51, Section 788, Code of Alabama 1940. Such exemptions are specified in the following sections of Title 51, Code of Alabama 1940, which provides in part as follows:

"Section 755. Exemptions.—There are however exempted from the provisions of this article and from the computation of the amount of the tax levied, assessed or payable under this article the following: * * * (b) The gross proceeds of sales of tangible personal property to the State of Alabama, to the counties within the state, and to incorporated municipalities of the State of Alabama."

"Section 789. Exemptions.—The storage, use or other consumption in this state of the following tangible personal property is hereby

specifically exempted from the tax imposed by this article: * * * (d) Property stored, used or consumed by the State of Alabama, by the counties within the state, or by incorporated municipalities of the State of Alabama."

That the University of Alabama is a public instrumentality of the State of Alabama carrying out a part of the State's program of public education cannot be questioned. See Constitution of Alabama 1901, Section 264, and Title 52, Chapter 26, Sections 486-509, Code of Alabama 1940. See also the case of **Allen, Collector of Internal Revenue for the District of Georgia, v. Regents of University System of Georgia,** 304 U. S. 439, 58 Sup. Ct. 980; **Turk v. County Board of Education of Monroe County,** 222 Ala. 177, 131 So. 436.

The answer to your inquiry depends on whether or not the Department of Physical Education and Athletics is a division of the University of Alabama and subject to the exclusive control and administration of the governing authorities of the University of Alabama. If this Department is in fact such a division of the University of Alabama, it is my opinion that sales of tangible personal property to said Department are sales to the State of Alabama within the meaning of Section 755(b), supra, and, as such, it is my opinion that the gross proceeds of such sales are exempt from the sales tax levied by Section 753, supra. Similarly, if the Department of Physical Education and Athletics is a division of the University of Alabama as above, it is my opinion that the storage, use or other consumption in this State by said Department of tangible personal property purchased at retail by said Department is storage, use or other consumption by the State of Alabama within the meaning of Section 789(d) supra, and, as such, is exempt from the tax imposed by Section 788, supra.

Attached to your request for this official opinion is a letter from you to Honorable Albert Pitts, dated March 22, 1948, from which I quote the following paragraphs:

"This will acknowledge receipt of your letter of March 16, inquiring as to the liability for payment of sales and use taxes on purchases made by the 'University Athletic Association.'

"Please let me point out in the beginning that the University does not now have, nor has it had for the past thirty-seven years or more, an 'Athletic Association.'

"I think I can best answer your letter by quoting from the minutes of a meeting of our Board of Trustees, held on May 25, 1936, when the question of taxability of the net profits of the University Athletic Association Fund was raised by the Federal Internal Revenue Service. An excerpt from the minutes of said meeting is attached hereto and marked Exhibit 'A' for identification.

"These minutes show clearly that the setup of our athletic activities is the same as that of any of our other University divisions, being

known as the Department of Physical Education and Athletics. As such it has never been required to pay sales or use taxes on its purchases. The same setup exists today that existed back in 1936."

I quote below the minutes of the Board of Trustees' meeting referred to in your letter:

"EXCERPT FROM THE MINUTES OF THE MEETING OF THE BOARD OF TRUSTEES HELD ON MAY 25, 1936, AS RECORDED IN TRUSTEES RECORD NO. 10, PAGES 546-547.

"President Denny reported to the Board that a representative of the Federal Internal Revenue Service had recently raised the question of the taxability of the net profits accruing to the University Athletic Association Fund . . .

"President Denny said that he had explained to the government agent that there had in fact been no athletic association in existence here for a quarter of a century; that the term 'athletic association,' inherited from the period when there was such an association in existence, had been adopted for the sake of bookkeeping convenience by the University, on taking over **in toto** a quarter of a century ago all the functions, liabilities, and assets of the then existing association; that the term has been subsequently used merely as the designation of a University Fund (precisely as in the case of certain other University funds that similarly trace their designation to historical sources) owned and administered by the University through a duly constituted Faculty Committee (of which the President of the University has from the beginning been an **ex officio** member). He added that the University Board had thus throughout the years exercised exclusive control through the President and the faculty committee . . . of every activity relating to physical education, including intramural and inter-collegiate athletics, as an integral part of its educational program; that no individual had ever shared in any profits or losses accruing to the University . . . from any other activities related to physical education and athletics, and that all receipts resulting from these activities have been and are being devoted solely to the maintenance and promotion of its program of physical education. He recommended that the present method of administration of the Athletic Association Fund be continued.

"Thereupon, it was voted:

"1. That no part of the Athletic Association Fund, which is the exclusive property of the University, is in the judgment of this Board subject to a federal tax. This fund is devoted solely to the University's physical education program. It is owned and controlled by the University and administered by this Board through the President and faculty committee exclusively for educational purposes . . .

"2. That the President and the Faculty Committee on Physical Education and Athletics be and are hereby authorized and empowered to continue, as heretofore, to administer the Athletic Association Fund from whatever source derived, with the proviso that all expenditures from the Fund other than those required in the ordinary and routine operation and maintenance of the Physical Education program as now organized shall be authorized in advance by the Executive Committee of the Board of Trustees.

"3. . . . . .

4. That in view of the misinterpretation of the use of the designation 'Athletic Association Fund,' the Faculty Committee on Physical Education and Athletics is hereby instructed at its earliest convenience to discontinue that designation and substitute therefor the designation 'Physical Education Fund.' "

The conclusion reached in this opinion is based on the above-quoted facts being true and correct and upon the assumption that the Department of Physical Education and Athletics and the Physical Education Fund is at the present time administered according to the provisions of the above-quoted minutes of the meeting of the Board of "Trustees of the University of Alabama.

Title 55, Section 156(2), Code of Alabama 1940, provides as follows:

"Section 156(2). Examination of records of state offices, etc.; uniform accounting and reporting.—The division of examiners of public accounts shall audit and examine the records and accounts of all **state** offices, bureaus, boards, commissions, institutions, agencies and departments. It shall prepare such bookkeeping, accounting, and reporting systems, procedures, records, and forms as are necessary for the installation of uniform accounting and reporting in all state offices, bureaus, boards, commissions, institutions, agencies and departments." (Emphasis supplied.)

Auditors from the Department of Examiners of Public Accounts, State of Alabama, examined and audited the University of Alabama Department of Physical Education and Athletics for the period July 1, 1946,-September 30, 1947, the report of said examination and audit being filed with the Chief Examination of Public Accounts, State of Alabama, on June 21, 1948. I quote from page B of this report:

"Scope of Examination and Records Involved:

"The University of Alabama Department of Physical Education and Athletics compose eight accounts and eight separate bank accounts: The Physical Education Fund, known as the General Fund, the Department of Athletics A. S. & E. Fund, the Department of Athletics Operating Fund, the Football Program Savings Account Fund, the Athletic Ticket Operating Fund, the Athletic Ticket Fund, the Physical Education and Athletic Dance Fund and the Football Program Fund."

In view of the fact that, as stated in your inquiry, purchases made by the Department of Physical Education and Athletics are paid for from the Physical Education Fund, I quote the above from the Examiners' Report to show that this Physical Education Fund is a fund controlled and administered by the University of Alabama Department of Physical Education and Athletics.

In view of the above it appears to be without question that the Department of Physical Education and Athletics is a division of the University of Alabama subject to the administration and control of the governing authorities of the University of Alabama, and that the University of Alabama is an institution or public instrumentality of the State of Alabama.

It is, therefore, my opinion that the sales of tangible personal property to the Department of Physical Education and Athletics of the University of Alabama are exempt from the sales tax levied by Title 51, Section 753, Code of Alabama 1940, such exemption being provided for in Title 51, Section 755 (b), Code of Alabama 1940. It is also my opinion that the storage, use or other consumption in this State of tangible personal property purchased at retail by the Department of Physical Education and Athletics of the University of Alabama is exempt from the tax levied by Title 51, Section 788, Code of Alabama 1940, such exemption being provided for in Title 51, Section 789(d), Code of Alabama 1940.

See also the opinion of this office rendered April 29, 1949, to Honorable Ralph P. Eagerton, Chief Examiner, Examiners of Public Accounts Department, Capitol, in which it was held that Boards of Education, schools and other educational institutions of the State of Alabama, as agencies of the State of Alabama, are exempt from the payment of Federal Excise Tax imposed by the Revenue Act of 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 23, 1950

Hon. Winston Stewart,
Judge of Probate,
Coosa County,
Rockford, Alabama.

Counties—Cemeteries—Appropriation of County Funds.

County governing body not authorized to appropriate public funds of the county for use in beautifying or maintaining cemeteries located in the county.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 2, 1950, is as follows:

"The Commissioners Court of Coosa County, Alabama, has been called upon to assist the different communities of the county in beautifying or cleaning off the cemeteries. The Court is willing to help provided we have such authority.

"I find in Title 37, Section 478 of the 1940 Code of Alabama, that cities or towns have such authority.

"Please give me your opinion as to whether or not the county may appropriate money from it's general fund for the purpose of maintaining cemeteries.

"Your prompt attention in this matter will be greatly appreciated, since this is the season for such work."

In my opinion your inquiry must be answered in the negative. I find no authority of law for the Commissioners' Court of your county to make such an opprapriation. As I am sure you know, and as has been held many times by this office, courts of county commissioners and boards of revenue are purely statutory bodies and have only such powers as are conferred upon them by law. See in this connection Quarterly Report of Attorney General, Volume 41, page 42, and authorities therein cited.

This office has likewise consistently held that public funds, subject to the control of the county governing body cannot be expended except when authorized by law or necessary implications of law. Quarterly Report of Attorney General, Volume 38, page 52. In the instant case, I find no direct or implied authority authorizing such an appropriation of county funds as that mentioned in your request. I must, therefore, advise that, worthy as the cause may be, such appropriation may not lawfully be made.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 23, 1950.

Hon. R. P. McRee,
Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery 2, Alabama.

Veterans—Licenses—Exemptions.

1. Veterans eligible for exemptions from license under Act 353, General Acts 1945, page 570, as amended by Act 698, General Acts 1947, page 535, may claim same for a period of six years from the effective date of Act 353, supra (July 6, 1945) or for a period of six years from their date of discharge or termination of service, whichever is later.

2. One eligible for exemption under said acts need not be a resident of the county in which the exemption is claimed, but may claim such exemption in any one county of the State without regard to his place of residence, but may not claim such exemption in more than one county.

3. The determination of the value of the real and personal property of the applicant for exemption is left to the probate judge.

4. In determining the net annual income of the applicant for exemption deduction should be made of all legitimate business expenses incurred in producing the annual gross income, but not personal expenses, contributions, etc.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, dated July 14, 1950, is as follows:

"We will appreciate clarification upon the following points regarding Veterans exemptions as set up by Act 353, approved July 6, 1945, and Act 698, approved October 13, 1947.

"Under these two Acts:

"1. If a veteran has received exemptions for one or more years prior to October 13, 1947, is he also entitled to exemptions for an additional six years, beginning October 13, 1947?

If entitled to an additional six years, does this six years include the year of 1947, if license issued prior to October 13th; that is, if exempt from license taken out on January 1, 1947, will veteran be eligible for exemption for license years beginning January 1, 1953?

"2. Provided a veteran is a permanent resident of the State of Alabama, and otherwise qualified for exemptions, what length of residence is required in the county from which he claims exemption on his county license?

Can a veteran who maintains his household in one county and who drives daily to his place of business in a second county, sleeping and eating each night in his home in the first county, claim exemptions on his license in the second county?

"3. If a veteran receives an exemption against his county license in the amount of $10.00 during the first part of the calendar year, can he establish his residence in the second county in the latter part of the same calendar year and receive exemptions from the second county for the remaining amount for which he was eligible in the first county?

"4. In reference to Section 2 of Act 698, does the valuation of the veteran's real and personal property depend on the valuation as set by the county tax assessor, or should said valuation depend on the purchase price paid by the veteran, provided such property was purchased immediately prior to the claiming of exemptions by said veteran?

"5. Also in reference to Section 2, Act 698 in which the expression 'net annual income is $3000.00 or more' is used, does this express reference to income of $3000.000 after only business expenses are deducted, or does it mean an income of $3000.00 after all business and personal expenses, contributions, etc., are deducted?

"Your answer to the above inquiries will be appreciated."

Your first inquiry must be answered in the negative. The exemptions afforded veterans, to which you refer in your request for opinion, were originally provided for at the 1945 session of the Alabama Legislature. See Act No. 353, General Acts 1945, page 570. This act, as originally adopted, provided that veterans qualified thereunder be exempt from business or occupational license taxes for a period of three years after the effective date of such act or for a period of three years after discharge from, or termination of service, whichever might be later, to the extent and subject to the conditions of such act. This act was approved by the Governor upon July 6, 1945, and its provisions became effective upon such date.

During the course of the 1947 session of the Alabama Legislature, said body saw fit to alter the above-mentioned provisions of Act 353, supra, with regard to the period of time during which such exemptions might be claimed by veterans eligible for same thereunder. This, the Legislature did, not by new and independent enactment, but by amending the provisions of Act 353, supra, in this regard. Section 1, Act No. 698, General Acts 1947, page 535, is here quoted in full:

"Section 1. Section 1 of Act 353, approved July 6, 1945, which relates to exemption of veterans from business or occupational license taxes, is amended to read: 'Section 1. Every bona fide permanent resident of the State of Alabama who has served 90 days or more in the armed forces of the United States between September 16, 1940, and the termination of World War II by the signing of a definite treaty of peace shall, upon sufficient identification, and upon sufficient proof of being a permanent resident of this State, and upon the production of an honorable discharge from or other proof of the honorable termination of such service, be exempt from business or occupational license taxes for a period of six years after the effective date of this Act or for a period of six years after his or her discharge from or termination of service, whichever is later, to the extent and subject to the conditions herein specified.' No exemption, however, shall be allowed any such person from the license tax on what commonly are known as rolling stores; nor shall the exemption herein granted be construed as relieving any person from the payment of any license tax for the registration or operation of any motor vehicle."

You will note that under the terms of this latter act, the time within which eligible veterans may claim the exemptions therein granted has been extended, said act providing that such persons shall be exempt from business or occupational license taxes for a period of six years after the "effective date of this act" or for a period of six years after his or her discharge from or termination of service, whichever is later, to the extent and subject to the conditions of such act.

Your question actually devolves itself into a determination of the meaning of the term "effective date of this act," that is, does such term refer to the effective date of Act 353, supra, or Act 698, supra.

In my judgment, such term refers to the effective date of Act 353, supra, i. e., July 6, 1945. This, for the reason that Act 698, supra, is purely amendatory in nature and the provisions thereof only serve to amend the terms of Act 353, supra, providing that Act 353, supra, shall now read and provide as prescribed by Act 698, supra. The terms of Act 698, supra, become in fact the terms of Act 353, supra. It is, therefore, my opinion that when reference is made to "the effective date of this Act" said reference is to the effective date of Act 353, supra, July 6, 1945. It, therefore, follows that answer to your first inquiry is in the negative, and that veterans eligible for benefits under the terms of Act 353, supra, as amended by Act 698, supra, may claim same for a period of six years beginning July 6, 1945, or for a period of six years from the date of his or her discharge from or termination of service, whichever is the later.

Inasmuch as the second portion of your first inquiry is conditioned upon my answer given above, and in view of the conclusion above expressed, it becomes unnecessary to give answer to this latter inquiry.

The questions propounded in your second inquiries appear to be predicated upon the false premise that in order for the veteran to claim

the exemptions granted by Act 353, supra, as amended by Act 698, supra, insofar as they relate to county license, such person must be a resident of the county in which such exemption is claimed. This is not the case. The only requirement as to residence to be found within the provisions of the two acts here considered, is that such claimant be a bona fide resident of the State of Alabama. However, such exemption cannot be claimed in more than one county. See Quarterly Report of Attorney General, Volume 53, page 41.

The answers to your second inquiries, therefore, are that no length of residence is required in the county in which the exemption is claimed, and secondly, that the veteran who maintains his place of residence in one county and his place of business in another may claim exemption upon his license in the latter. However, as stated, the exemption can only be claimed in one county.

Answer to your third inquiry is found in the provision of Act 353, supra, stating that with reference to county licenses no veteran may claim the exemption in more than one county. As I understand your third inquiry, the person there in question is seeking to claim exemption from county license in two different counties during the same year. This, he may not do, irrespective of the fact that the total exemption claimed does not exceed the allowed sum of thirty-five dollars. Quarterly Report of Attorney General, Volume 51, page 94.

With reference to your fourth inquiry, I would advise that, in my opinion, neither of the criteria or standards there mentioned by you should be conclusive as to the value of the real and personal property of the veteran in question. Both, however, are factors that could well be considered by the probate judge in determining the valuation of the veteran's property. That portion of Act 698, supra, pertinent to your last two inquiries is as follows:

> "* * * Provided, however, that any veteran whose property, both real and personal, is valued at $7,000.00 or more or whose net annual income is $3,000.00 or more shall not be granted the exemption provided herein but shall be granted an exemption of $15.00 on his licenses from each the City, County and State."

In my opinion, the determination of the value of the property owned by such veteran is left to the probate judge, to be determined by him in such manner as to reasonably satisfy him as to the eligibility of such applicant to the exemption sought.

In doing so, he may consider the assessed valuation of such property, the purchase price paid therefor, as well as all other pertinent factors, such as reasonable market value, etc., but, in my opinion, no one factor is conclusive and all are to be considered by the probate judge in determining the eligibility of the applicant for the exemption sought. Cf. **Long, Judge, v. Jasper Land Company,** 217 Ala. 593, 117 So. 210. It is also of interest to note that under the provisions of Act 353, supra, any license fraudulently

obtained is null and void and affords no protection to the holder thereof from prosecution. Therefore, should an applicant falsify the information furnished the judge of probate in order to obtain a license, such license would be null and void and afford no protection to him.

Answering your fifth and last inquiry, I am of the opinion that the "net annual income" there referred to, is that income remaining after deducting from the gross income or earnings, the cost of producing same; in other words, that which remains of the gross income after deducting the expenses incurred in producing said gross income; the produce of the business deducting the expenses only. 42 C. J. S., Income, 536; 28 Words and Phrases (Per. Ed.), Net Income, 528.

Inasmuch as we are here dealing with the exemption from business or occupational license taxes, it is my judgment that in determining the "net annual income" of the applicant, there should be deducted from said applicant's gross income only those business expenses incurred by him in producing the gross income, not including personal expenses, contributions, etc. The residue should represent his net income within the purview of this act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 23, 1950.

Hon. J. M. McLeod,
Judge of Probate,
Wilcox County,
Camden, Alabama.

Counties—Courts of County Commissioners—Compensation—Wilcox County.

Under the provisions of Act No. 203, Local Acts 1945, page 110, amending Act No. 436, Local Acts 1939, page 261, the associate members of the Court of County Commissioners of Wilcox County are to receive as compensation a monthly salary of fifty dollars in lieu of all per diem and mileage expenses or fees previously allowed them under the general law.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, dated August 15, 1950, is as follows:

"I have before me the Cobb-Harrison-Henderson Act, Local Bill, Acts of 1945, Page 110. This bill attempts to fix the compensation of

the associate members of the Court of County Commissioners of Wilcox County, Alabama. Under Section 1 the act provides, among other things, as follows: 'to fix the compensation of the members of said Court, and to provide for a per mile traveling expense;'. Then the last line of Section 1 says as follows: 'The associate members of said Court shall receive as compensation a salary of fifty dollars ($50.00) per month.'

"Please advise us if said members are limited to a flat salary of $50.00 per month or are they allowed in addition thereto per mile traveling expense? If you rule that they are entitled to mileage plus the salary—is there a maximum sum allowed for such per mile traveling expense?"

The act to which you refer in your request for opinion is to be found recorded as Act No. 203, Local Acts 1945, page 110. The provisions of said act serve only to amend one section (Section 8) of a prior act pertaining to the establishment, composition, duties, operation, etc., of the Court of County Commissioners of Wilcox County. The former act here mentioned is Act No. 436, Local Acts 1939, page 261.

Under the terms of Act No. 436, supra, it is provided, with reference to the compensation of the associate members of such commissioners' court, the subject of inquiry here, that:

". . . The associate members of said court shall receive as compensation, the same compensation as allowed to members of Courts of County Commissioners under the general law of the State of Alabama. Provided, however, that said associate members shall not receive any per diem or traveling expenses other than that allowed them in traveling to and from their respective homes for the purpose of attending meetings of the Court."

Act No. 203, supra, the 1945 Act, amends said section so as to read as follows:

"Section 8. COMPENSATION: The Judge of Probate as the Chairman of said Court shall receive as compensation for his services required under this Act the same salary, fees and compensation now or that may hereafter be allowed to the Judge of Probate for like services as Chairman of the Court of County Commissioners under the general laws of the State of Alabama. The associate members of said Court receive as compensation a salary of fifty $50.00) per month."

Clearly, under the terms of this latter act, the compensation of the judge of probate, acting as chairman of said commissioners' court, remains the same, that is, the compensation prescribed by the general law on this subject. However, with reference to the compensation of the associate members of such court, a different situation is presented. Whereas, under the provisions of Act No. 436, supra, their compensation was the same as that allowed under the general law of the State, with a restriction as to

the amount of per diem and travel expenses that might be claimed, it is now provided by Act No. 203, supra, that such associate members shall receive as compensation a salary of fifty dollars per month. You inquire as to whether, in addition to such amount, said associate members are also entitled to the mileage fee allowed by Title 12, Section 28, Code of Alabama 1940, as amended.

In my opinion, answer to such question is in the negative, as it is my judgment that the sum of fifty dollars per month, prescribed by Act No. 203, supra, is in lieu of all other fees, allowances, and remuneration authorized or provided for under the general law.

We are here concerned with the "compensation" of the associate members of the court. The ordinary meaning of the term "compensation," as applied to officers, is remuneration in whatever form it may be given, whether it be salary and fees, or both combined. **State v. Bland,** 91 Kan. 160, 136 Pac. 947; **State v. Watkins,** 88 Fla. 392, 102 So. 347. It is broad enough to include other remuneration for official services, such as mileage or traveling expenses. **Leckenby v. Post Printing & Publishing Co.,** 65 Colo. 443, 176 Pac. 490.

Whereas said members, prior to the passage of Act No. 203, supra, had been compensated for their services in accordance with the provisions of the general law, it is now provided by such act that they shall receive as **"compensation"** a salary of fifty dollars per month. "Compensation," under the general law, consisted of a per diem allowance as well as a mileage allowance, whereas, under the terms of Act No. 203, supra, it consists of a salary of fifty dollars per month. I must, therefore, hold that the monthly compensation of fifty dollars is in lieu of the former "compensation" received under the general law, consisting of a per diem as well as a mileage allowance. Such, in my judgment, is the clear intent of the act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 30, 1950

Hon. Henry W. Smith, President
Board of Revenue
Etowah County
Gadsden, Alabama

Counties—Lease of County Property

1. The governing body of a county is authorized to lease county property when such property is not used for county purposes.

2. The nature, terms, price, etc., of a lease so entered into by a county governing body is largely within its discretion, and

in absence of fraud, corruption, or unfair dealing, such action will not be disturbed.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of August 4, 1950, is as follows:

"As President of the Etowah County Board of Revenue, and under authority of Title 55, Section 240 of the 1940 Code of Alabama and Amendments thereto, I respectfully request an opinion of you on the questions arising from the following statements:

"A short time ago the new Etowah County Courthouse and Jail Building was completed which contains a small lunchroom and grill and which was equipped by Etowah County at a cost of approximately $8,000.00. John Perry Carruth, a blind man of this County, had the concession in the old Courthouse for a soft drink, tobacco and candy counter and upon completion of the new Courthouse, the lunchroom was rented to him at a cost of $65.00 per month, which amount includes utilities. This rental was figured on a 15-year depreciation basis of the cost of the equipment.

"Mr. Carruth, as shown by his operating statement, is unable to continue the operation of the lunchroom due to the fact that he is losing money and is unable to maintain himself and his family on returns thereof. It is the considered opinion of the Board of Revenue of Etowah that it is to the interest of the general public and the employees of the County who work in the C ourthouse that the Board of Revenue is willing to rent said lunchroom to Mr. Carruth for a nominal rental of $1.00 per month if they can legally do so.

"The legal questions which arise under the above statement of fact and of which we request your opinion are as follows:

"1. Under the above statement of facts can the Etowah County Board of Revenue legally rent said lunchroom and grill to John Perry Carruth, a handicapped person, at and for a nominal sum of $1.00 per month?

2. If your answer to question number one is in the affirmative, can the Board of Revenue of Etowah County legally assume and pay the cost of utilities furnished said lunchroom and grill out of the funds of Etowah County?

My answer to your first question is in the affirmative.

Title 12, Section 177, Code of Alabama 1940, reads as follows:

"§ 177. The court of county commissioners have control of all property belonging to the county, and may, by an order to be entered

on its minutes, direct the disposal of any real property, which can be lawfully disposed of, and direct the probate judge to make titles thereto; and a conveyance made by the probate judge in accordance with such order invests the grantee with the title of the county."

It has been held by the Supreme Court, in the case of **Jackson vs. Ball,** 211 Ala. 273, 100 So. 327, that when any property owned by the county and under the control of the county governing body is not presently needed for county purposes, then the county governing body may lease such property.

Under the facts stated by you, I do not see how this lunchroom could be used for county purposes, and under the authority of the **Jackson Case,** supra, it is my opinion that the county governing body is authorized to lease this property to Mr. Carruth.

It follows that if the county governing body was authorized in the first instance, which it was, to rent this property to Mr. Carruth for the sum of $65.00 per month, it would likewise be authorized to rent it for the nominal sum of $1.00 per month.

In answer to your second question, you are advised that, in my opinion, if the county governing body sees fit, it may legally assume and pay for the cost of utilities furnished said lunchroom and grill out of the funds of Etowah County.

As pointed out in answer to your question No. 1, the county governing body has authority to enter into this lease, and it has been held that a county governing body, while acting under this authority, in its discretion, may fix the nature, terms, price, etc., of the lease, and in the absence of fraud, corruption, or unfair dealings, the action of the county governing body in this respect will not be disturbed. **Board of Revenue of Covington County v. Merrill,** 139 Ala. 521, 68 So. 971; **Corning v. Patton,** 236 Ala. 354, 182 So. 39.

You are, therefore, advised that it is within the discretion of the governing body of Etowah County as to whether or not, as a part of this lease, it will furnish to Mr Carruth the utilities used in the lunchroom. and grill, and if in the discretion of the governing body of your county, it is best to so furnish such utilities, its action will not be disturbed by the courts in the absence of fraud or corruption.

In conclusion, you are advised that under the facts as outlined by you, the county governing body of Etowah County may rent this lunchroom and grill to Mr. Carruth at the nominal sum of $1.00 per month, and if, in their discretion, it is more advantageous to the county, it may likewise furnish and pay for out of county funds the utilities used by such lunchroom

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 6. 1950

Hon. E. T. Millsap
President, The County Commission
Monroe County
Monroeville, Alabama

Counties—Courthouses—Contracts—Bids.

Since county officers and boards are exempt from the operation of Act. No. 492, General Acts 1947, page 338, the county governing body of Monroe County lawfully may contract for the construction of an addition to the courthouse without advertising for competitive bids and awarding the contract to the lowest responsible bidder.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an officials opinion, dated August 15, 1950, is as follows:

"The County Commission of Monroe County, Alabama, is considering building an addition to the County Courthouse of said County for the purpose of housing the public records of the Probate Office. This will be in the nature of a fire-proof record room.

"Con the County Commission do this without advertising for bids and awarding the contract ot the lowest responsible bidder? I take it that under Title 50, Section 15 (13) of the Core of Alabama the County Commission can contract for this work without advertising for bids, but I would like to be certain on this point."

Your inquiry is answered in the affirmative.

Section 13 of Act No. 492, General Acts 1947, page 338 (codified as Title 50, Sections 15 (1)-15 (13), 1949 Cumulative Pocket Part, Code of Alabama 1940), which Act relates to and regulates contracts for public works, expressly provides that the term "awarding authority," as therein used, "shall not include any county board of education or other county or municipal officers or board."

Since county officers and boards are expressly excluded from the operation of Act. No. 492, supra, I am of the opinion that, in the absence of a controlling local law, the county governing body lawfully may contract for the work described, without advertising for competitive bids and awarding the contract to the lowest responsible bidder. See Title 12, Section 178, Code of Alabama 1940, and authorities thereunder annotated. There has come to my attenton no local law applicable to Monroe County which requires that such work be done under competitive bids.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 6, 1950

Hon. Holt A. McDowell
Sheriff, Jefferson County
Court House
Birmingham3, Alabama

Bonds—Bail—Sheriffs.

Under the provisions of Title 15, Chapter 9, (Sections 185-218), Code of Alabama 1940, as amended by Act. No. 199, General and Local Acts 1949, page 230, a defendant, rearrested on an alias warrant after forfeiture of bail, is entitled to bail in case of a bailable offense. The situation reverts to that of the original arrest and proceedings for granting bail will be governed accordingly.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of August 2, 1950, is as follows:

"A defendant, following arrest under a proper warrant, makes sufficient bail to appear in Court, he does not appear, a forfeiture is taken against his bail and an alias warrant of arrest is isued against him, the defendant is arrested by me and placed in jail.

"Under the circumstances outlined above, and with which I am frequently confronted, please answer for me the following:

"1. Is the defendant entitled to bail following his arrest under the alias warrant?

"2. Is it necessary that the Court ordering the arrest on the alias writ authorize and fix the bail?"

"3. Is there any distinction between defendants charged with misdemeanors and those charge with felonies in this connection?"

I am of the opinion that your first inquiry should be answered in the affirmative. This is assuming that the offense involved is a bailable one for which bail was allowed in the first instance.

Our statutory provisions relating to bail were incorporated in Title 15, Chapter 9 (Sections 185-218), Code of Alabama 1940. This chapter was amended in toto by Act. No. 199, General and Local Acts 1949, page 230. Some of the sections as they appeared in Code of Alabama 1940 remained as they were others were changed and additions made. Reference hereafter made to the Code sections will be considered as referring to the sections as incorporated in the 1949 Act. Chapter 9, supra, as amended,

is set forth in full as Title 15, Chapter 9, (Sections 185-218), 1949 Cumulative Pocket Part, Code of Alabama 1940

Title 15, Sections 195 and 196, supra, read as follows

"§ 195. When bail not allowed. A defendant cannot be admitted to bail when he is charged with an offense which may be punished by death, if the court or magistrate is of the opinion, on the evidence adduced, that he is guilty of the offense in the degree punishable capitally; nor when he is charged with a personal injury on another which is likely to produce death, and which was committed under circumstances such as would constitute murder in the first degree if death should ensue."

"§ 196. When matter of right. In all other cases than those above specified, the defendant is, before conviction, entitled to bail as a matter of right."

It is seen from the above that a defendant is entitled to bail as a matter of right, other than in those cases specifically excepted. **Parsons vs. State, 33 Ala. App. 309, 33 So. 2d. 164.**

Where bail is a matter of right and prior absconding and forfeiture is not excepted from such right, bail must be allowed irrespective of such circumstances. 8 C. J. S. 77, Bail, Section 36d.

It, therefore, follows that if the offense is a bailable one, a defendant rearrested on an alias warrant after forfeiture of bail is entitled to bail. This is true irrespective of the fact that a forfeiture is taken on his original bail, as bail is a matter of right in all cases unless specifically excepted.

When a forfeiture is taken on an original bail and an alias warrant of arrest is issued and the defendant placed in jail, the situation reverts to that of the original arrest. Therefore, the proceedings for granting bail will be governed accordingly. In the case of a misdemeanor, defendant may be granted bail by the sheriff under Title 15, Sections 188 and 191, supra, and in the case of a felony, the judge of a court of competent jurisdiction fixes the amount of the bail under Title 15, Section 189, supra. Reference is also made to the provisions of the 1949 Act regarding cash bail.

The preceding paragraph will give you the information you desire in regard to your second and third inquiries.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 7, 1950

Hon. Broughton Lamberth, Commissioner
Department of Public Welfare
State of Alabama
CAPITOL

Public Welfare, Department of.

Federal funds may be used by the State Department of Public Welfare to provide a more equitable distribution of welfare funds to needy persons throughout the various counties of the State of Alabama.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, dated August 24, 1950, is as follows:

"The State Department of Public Welfare has formulated a plan for the use of Federal funds to provide a more equitable distribution of public assistance funds to needy persons in similar circumstances throughout the various counties of the State. There are certain obvious inequities among the various counties under the present system of financing the public assistance, program, and these inequities may become even greater. The Social Security Administration from time to time has called our attention to these inequities and has repeatedly urged that this Department take steps to correct in so far as possible these inequities and thus conform to Federal requirements. In fact, the Social Security Administration is raising the question as to whether the public welfare laws of Alabama allow the use of Federal funds for providing a more equitable public assistance program. This is the background for the following plan which we have devised, and I desire your opinion as to the allowability of such a plan, and your opinion as to whether or not there is any prohibition in the public welfare and public assistance laws of Alabama against such a plan.

Proposed Plan

"A. **County Department Action**

"1. Each county director will determine annually the total amount of local funds (city and county) available for public welfare purposes.

"2. Each county director will determine the average annual eligible caseload category by category.

"3. Each county director, with the approval of the county board, will prepare, in line with policies established by the State Department, an annual administrative budget.

"4. Each county director will deduct the local funds for administration from the total local funds available.

"5. Each county director, with the approval of the county board, will determine what portion of the remaining local funds will be used category by category.

"6. Each county director will submit to the State Department of Public Welfare the annual administrative budget, together with the average annual eligible caseload and the amount of local funds to be used for public assistance purposes category by category.

"B. **State Department Action**

"1. The State Department will determine statewide and county by county average budgetary deficits category by category.

"2. The State Department, from the above information, will determine category by category the percentage of budgetary deficit that can be met on a statewide basis. The percentage appropriate to each category will be applied in every county.

"3. The State Department of Public Welfare will then match local funds with State funds dollar for dollar within various established maximums.

"4. These State and local funds will be applied category by category and Federal funds will be used to make up the difference up to the statewide percentage of need which can be met category by category. This will mean that a different percentage of Federal funds may be in effect in each of the 67 counties.

"The terms 'budgetary deficit' and 'need' have been well defined in the regulations of the State Department of Public Welfare, and these regulations are in conformity with State and Federal laws. Likewise, these regulations are applied uniformly throughout the State.

"We do not feel that under the complex method of financing the public welfare program in Alabama any measure of local economic ability to support public welfare can be established.

"In summary, I should like to know whether there is any prohibition against the use of Federal funds pursuant to the plan outlined above. I desire your opinion as soon as possible since I must attend a State Administrators' meeting in Washington early in September to discuss Alabama's plan for conforming to the Federal requirement of similar treatment of persons in like circumstances throughout the State."

You may use Federal funds to provide for a more equitable distribution of welfare funds to needy persons throughout the various counties of the state, pursuant to the proposed plan outlined in the above request. There appears to be no plan outlined in the Alabama Public Welfare Laws (Title 49, Code of Alabama 1940, as amended), or in the Fed-

eral Social Security Act (42 U. S. C. A. 301, et seq., as amended). Indeed, the facts of your request indicate that the Social Security Administration is urging that the Federal funds be used to provide a more equitable public assistance program in Alabama.

It is the express purpose, plan, and direction of the Federal Social Security Act, supra, that the public assistance program in Alabama be equalized and made equitable as it affects needy persons in Alabama. Of course, our laws, and the administration of our laws, are to conform with Federal standards.

Title 49, Sec. 30, as amended, provides that state and local funds shall be used to meet federal matching in the most advantageous proportion permitted by law from time to time. A construction of "advantageous" as meaning advantageous to the recipients of welfare funds clearly authorizes the use of federal funds for equalization purposes. But even if one assumes, arguendo, that "advantageous" should be given another meaning i. e., advantageous in terms of the amount of federal dollars returned to Alabama for administration—there would still appear to be ample authorization for your proposed plan. Indeed, the federal government has directed equalization, and presumably, certain sanctions are threatened if equalization is not accomplished, at least in part. Thus, it would be highly disadvantageous to fail to equalize if the loss of federal funds is the possible penalty for such a failure.

It is noteworthy that the very federal formula itself necessarily means that some counties will receive a higher percentage of federal funds in proportion to state and local funds than other counties. An illustration concerning old age assistance will be helpful. Federal funds are received on the basis of state-wide average payments. Counties falling below a state-wide average of $20.00 per month per recipient receive a higher proportion of federal participation than counties which are above the state-wide average. For 42 U. S. C. A. 303, as amended, provides that the Federal Government participate in the proportion of three-fourths of the monthly expenditures in the state concerned up to $20.00 per individual recipient and one-half of the monthly expenditure in the state from $20.00 to $50.00 per individual recipient.

Other sections in Title 49, Code, are important. Section 5 gives the State Board of Public Welfare the authority to make grant-in-aid to county departments of public welfare, requiring that these county departments bear a fixed proportion of the total expenditures for which the grant is made available. The proportions are to be determined, in part, by the funds available to the State Department of Public Welfare (presumably, federal funds are available to the State Department). The proportions are also to be determined, in part, by the resources and needs, of the several local governments. Then, there follows:

> "The method of determining the resources and needs of the several local governments shall be **uniform** throughout the state." (Emp. Supplied).

Thus, Section 5 indicates an attempt, by the Alabama Legislature to provide a method of acheiving uniformity based on need.

Obviously, the needs of the local governments would be the collective needs of the various welfare recipients, or potential welfare recipients, in so far as Title 49, Section 5, supra, is concerned.

The language in Title 49, Section 13, Code, buttresses the reasoning in the above paragraph:

> "When federal and state funds are available for use by county boards, they shall be allocated by the state board. Due consideration shall be given in the allocation of these funds to population, extent of need, and the financial conditions of the county."

Thus, Sections 5 and 13, taken together, indicate a legislative intent that federal funds be made available to the counties in certain proportions, that the determination of those proportions should indicate a consideration of need and financial conditions, and that the standards for determining need be uniform throughout the state.

The sections of Title 49, discussed above, point to positive legislative statements indicating an intent that federal funds be allocated to the county department; that federal funds be used in the most advantageous proportion permitted by law from time to time; and that uniformity, equity, and equality, be the underlying theme of the administration of the welfare funds in public assistance programs. As stated, there is no express prohibition against the use of federal funds for the equalization purposes which you propose. In the absence of any prohibition, and with the presence of the sections of Title 49, which I have discussed, I conclude that the proposed plan for equalization and equity in the public assistance program of Alabama is allowable.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 11, 1950

Hon. R. P. McRee, Adminstrator
Alabama Alcoholic Beverage Control Board
CAPITOL

Alcoholic Beverage Control Board—Members—Official Bond—Legal Expenses.

The Alcoholic Beverage Control Board may not expend money in payment of legal expenses incurred by the surety of the members thereof in defending suit brought against said surety for their own act on the bond existing between said surety and Board member.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of July 28, 1950, is follows:

"From and after March 1943, Dr. E. C. Ray was Chairman of the Alabama Alcoholc Beverage Control Board, and John E. Toomey and A. C. Lee were members of the said Board, and David W. Krasner and Irvin N. Krasner were the holders of Retail Beer License No. 143 for The Tavern, at Warrior, Jefferson County, Alabama for the year 1943.

"On the 12th day of March, 1943, said Ray, Toomey and Lee, acting as the ABC Board, revoked and canceled said license. The said Krasners filed a petition in the Circuit Court of Jefferson County, Alabama, on June 8, 1943 and claimed an alternative writ of mandamus against said Ray, Toomey and Lee, as Chairman and Members of the ABC Board, requiring them to cancel and set aside their order revoking Beer License No. 143, and reinstate the same.

"Said Ray, as Chairman, and Toomey and Lee, as Members of the said Board, did on June 14th set aside and cancel said order and reinstated said Retail Beer License No. 143.

"And on June 15th, the said Kasrers received a notice from said Ray, as Chairman, and Toomey and Lee, as Members of the ABC Board, that a hearing would be held on June 25th on the question of revoking said license No. 413 for The Tavern, at Warrior, Jefferson County, Alabama, and on the said June 25, 1943, said Ray, Toomey and Lee, as Chairman and Members of the said Board, did again revoke Beer License No. 143 of said Krasners for The Tavern, at Warrior, Jefferson County, Alabama.

"On the 24th day of September, 1943, said Krasners again obtained from the Circuit Court of Jefferson County, Alabama, another alternative writ of mandamus, directed to said Ray, Toomey and Lee, as Chairman and Members of the Alabama Alcoholic Beverage Control Board, directing them to cancel said order of revocation of said beer license No. 143, or show cause on October 8th, why said alternative writ of mandamus was not obeyed. Said hearing was continued by agreement until October 13th, and on October 11th, said Krasners received notice from said Ray, Toomey and Lee, Chairman and Members of the said ABC Board, that License No. 143 had been reinstated.

"Glen Falls Indemnity Company, a corporation, was surety on the bonds of E. C. Ray, as Chairman, and John E. Toomey and A. C. Lee, as Members of the ABC Board, at the time of the action of the said Ray, Toomey and Lee set out above.

"On January 31, 1948, said Krasners brought a suit in the U. S. District Court for the Northern District of Alabama, Southern Division, at Birmingham, Alabama, against said Glen Falls Indemnity Company, a corporation, as surety of said E. C. Ray, Chairman, and John E. Toomey and A. C. Lee, as Members, of the ABC Board, for $50,000.00 claiming damages for and on account of the official acts of E. C. Ray, Chairman, and John E. Toomey and A. C. Lee, Members of the ABC Board, as above set forth.

"That in and as a part of the application to the said Glen Falls Indemnity Company, a corporation, for the bonds of said E. C. Ray, as Chairman, and John E. Toomey and A. C. Lee, as Members of the ABC Board, they each agreed to indemnify Glen Falls Indenity Company, a corporation, against all damages, etc., accruing on account of the execution of said bonds.

"After the suit referred to above was filed, the Glen Falls Indemnity Company, a corporation, employed the firm of Lange, Simpson, Robinson and Somerville, of Birmingham, Alabama, to defend said action and suit, and now claim of said E. C. Ray, Chairman, and John E. Toomey and A. C. Lee, Members of the ABC Board, the sum of $750.00, as attorneys' fee due said Lange, Simpson, Robinson and Somerville for defending said suit.

"The minutes and records of the ABC Board show that the Chairman and Members of the Board were acting in good faith and in accordance with the wishes of the governing bodies of the Town of Warrior in cancelling the beer license detailed above.

"Under the above facts, can the ABC Board legally pay the fee of $750.00 to the firm of Lange, Simpson, Robinson & Somerville for defending the litigation as outlined?"

In my opinion, your inquiry must be answered in the negative.

The legal expenses here in queston were incurred, not by the members of the Alcoholic Beverage Control Board, either individually or in their official capacity as such Board members, but rather by their surety, the Glen Falls Indemnity Company, a Corporaton, for their own act of litigation between said corporation and others.

You state that in and as a part of the application made by said members to the Glen Falls Indemnity Company for their respective bonds, each of said Board members did agree with the surety that they would indemnify the said Glen Falls Indemnity Company against all damages, etc., accruing on act of the execution of said bonds. In my opinion, such is an agreement or contract existing solely between the surety and the several principals, the members of the Alabama Beverage Control Board. In my judgment, the State of Alabama could incur no liability nor expend any State funds, under or toward the fulfillment of such an agreement or contract between surety and principal.

The bond required of the members of the Alcoholic Beverage Control Board is provided for under the provisions of Title 29, Section 3, Code of Alabama 1940, such bond to be in form approved by the Attorney General and in such amount as is fixed by the Governor, with premium on such bonds being paid by the State of Alabama. Provisions relating to the establishment, operation and management of the Alcoholic Beverage Control Board are to be found within Title 29, Chapter 1, Code of Alabama 1940. Nowhere within such title and chapter do I find any authority, expressed or implied, whereby agencies would be authorized to assume payment of the legal expenses incurred by the surety of the members thereof in de-

fending a suit between said surety and others. As noted, any agreement to so reimburse said surety for such expenses exists solely between the surety and principal as a condition incident to the issuance of said bond.

In the case of the **Union Indemnity Company vs. Webster,** 218 Ala. 468, 118 So. 794, the Supreme Court stated that the official bond of an officer constitutes a contract between the officer and his surety, on the one hand, and the State and all persons who may be injured by violation of the bond, on the other. In my judgment, the portion of said agreement or contract pertinent to the inquiry here considered is that portion existing between surety and principal, an agreement with which the State of Alabama has no concern.

I must, therefore, advise that the Alabama Alcoholic Beverage Control Board may not expend public money in payment of the legal expenses here considered.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 11, 1950

Hon. John Garrett, President
Board of Revenue
Cherokee County
Centre, Alabama

Counties—Officers and Offices—Judges Cherokee County—Inferior Courts.

1. Under Act No. 163, Local Acts 1943, page 81, as amended, Senate approval is not necessary to Governor's appointment to fill vacancy in office of Judge of Cherokee Law and Equity Court.

2. Such an appointee, who is ineligible, holds as de facto officer, and the disbursing officer in paying salary may rest on his apparent title to the office.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of August 15, 1950, is as follows:

"Please give me official opinion on following statement of facts:

"I direct your attention to Local Acts 163 found at page 81 of Local Acts of 1943. Section 2 of said Act provides in the last

sentence thereof 'The said Judge shall be a qualified elector of Cherokee County; shall be learned in the law and shall be not less than TWENTY-FIVE YEARS OF AGE'.

"Section 2 of said Act referred to, provides 'That the Judge for said Court shall be appointed by the Governor of the State immediately after the approval of this Act with the approval of the Senate'.

"Section 3 of said Act provides 'Vacancies in the office of the Judge of said Court shall be filled by appointment by the Governor'.

"Please advise if a person appointed to fill a vacancy is or not such an appointment as is required to be approved by the Senate, these two Sections being construed together.

"On August 9th, Governor James E. Folsom, appointed to fill a vacancy caused by the death of Judge F. M. Savage, presiding Judge of Cherokee Law and Equity Court, Mr. Clarence Simmons, who was born on October 10, 1925.

"Please advise if payment by Board of Revenue of the salary of such Judge, apponted by the Governor, the Appointee not being TWENTY-FIVE YEARS OF AGE as required in Section 2 of said Act, will be legal payment of County Funds as provided under Section 5 of said Act as amended by Act. No. 493 at page 192 of Local Acts of 1945 by me as President of the Board of Revenue of Cherokee County, Alabama."

In reply to your first question, I am of the opinion that an appointment by the Governor to fill the vacancy of judge in the Cherokee Law and Equity Court does not have to be approved by the Senate.

Your attention is called to Section 153 of the Constitution of Alabama 1901, which is as follows:

"§ 153. The judges of such inferior courts of law and equity as may be by law established shall be elected or appointed in such mode as the legislature may prescribe."

The constitutional provision in regard to filling vacancies in the judiciary applies only to the judges and chancellors specifically named in the Constitution. **State v. Sayre,** 118 Ala. 1, 24 So. 89. Therefore, we must look to the legislative intent as expressed by Act. No. 163, Local Acts 1943, page 81, as amended by Act. No. 493, Local Acts 1945, page 192, and as further amended by Act No. 153, General and Local Acts 1949, page 178, which governs the court.

A careful reading of Act. No. 163, as amended, supra, convinces me that it was the intent of the Legislature, as expressed by Section 2, to

have the Governor appoint the first judge on the court with the approval of the Senate, but that all subsequent appointments should be made in accord with Section 3 by the Governor without Senate approval. Section 3 of Act No. 163, as amended, supra, is as follows:

> "Section 3. Vacancies in the office of the judge of said court shall be filled by appointment by the Governor, and the person so appointed shall hold office as required by the Constitution of this State. Said judge may be removed from office in the manner and for the causes, now provided by law for the removal of Circuit Judges."

I am of the opinion that your second inquiry should be answered in the affirmative.

If the present incumbent has assumed and is exercising the duties of his office, he is a defacto officer. An officer de facto is one who exercises the duties of an officer under color of appointment or election to that office. **Coe v. City of Dothan,** 19 Ala. App. 33, 94 So. 186; **Irwin v. Jefferson County,** 228 Ala. 609, 154 So. 589; **Gladson v. Wilson,** 120 S. W. 2d 732, 196 Ark. 996; **Williamson v. Woolf,** 37 Ala. 298. This is true even though he may be ineligible or not qualified. **Chancy v. State,** 170 Ala. 83, 54 So. 522; **Kumble v. Bender,** 196 A. 409, 173 Md. 608; **Alleger v. School District,** 142 S. W. 2d 660; **Heath v. State,** 36 Ala. 273. Judicial as well as ministerial officers may be officers de facto. **McDowell v. U. S.,** 159 U. S. 596, 40 L. Ed. 271; 16 S. Ct. 111, 43 Am. Jur., p. 225.

The disbursing officer, in paying salaries, may rest upon an appointee's apparent title to an office. **Irwin v. Jefferson County,** 228 Ala. 609, 154 So. 589. He is under no duty to inquire into or determine whether the appointee was entitled to hold and perform the duties of the office. **Walden v. Town of Headland,** 156, Ala. 562. It is manifest that the ordinary muniments of title to an office must suffice to establish the rights of the incumbent whenever it is collaterally called into question. **Reynolds v. McWiliams,** 49 Ala. 552.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 11, 1950

Hon. Edgar Underwood
Judge of Probate
Franklin County
Russellville, Alabama

Counties—Municipalities—Highways and Highway Department—Eminent Domain.

1. In condemnation proceedngs instituted by a county to secure right of way for a state highway, the decree awarding dam-

ages should run against the county, there being no requirement that the State Highway Department reimburse the county for costs and damages prior to the time of such decree.

2. A county legally may, and should, advance the costs and damages assessed against the county in obtaining a right of way for state highway purposes, but such county must be reimbursed by the State for the entire cost thereof upon acceptance of the right of way by the State Highway Department.

3. A municipality legally may, and should, advance the costs and damages assessed against the municipality in obtaining a right of way for a state highway through such municipality, but the municipality must be reimbursed by the State for the entire cost thereof upon acceptance of the right of way by the State Highway Department.

4. Should a municipality fail or refuse to acquire the right of way for a state highway through such municipality, the duty of acquiring the same shifts to the State Highway Department, the county being without authority to advance the cost thereof.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of July 11, 1950, is as follows:

"The State Hghway Department is constructng a state highway from Hodges toward Red Bay in Franklin County, Alabama, without any participation by the county for the construction of the road. Franklin County is cooperating by procuring the right-of-ways for said road by deeds from the property owners as far as possible and prosecuting condemnation proceedings under its power of eminent domain for those segments of the right-of-way as surveyed by the state engineers outside of the municipalities where the property owners have refused to execute title for a nominal sum. The municipality of the Town of Vina has also filed condemnation proceedings for segments of the road lying within the municipal incorporation. A number of condemnation proceedings are pending in my court, some by the county under the authority and order of the Court of County Revenue and some by the said Town of Vina. A controversy has arisen over who will be liable for the payment of costs and damages that will be decreed in favor of the property owners, also for the nominal compensations recited in the deeds being voluntarily made by the property owners in view of Act. No. 283, H. 231 in Lovelace, White (Perry), 1949 Acts, page 407. This act amends Section 25, Chapter 21, Title 23, Code of Alabama 1940.

"Please advise me whether or not the decree of the probate court should run against the county for the damages awarded by commissioners appointed by said court to appraise the property or should it run against the State Highway Department and should the highway department be required to pay the funds into probate court before the decree of condemnation is rendered?

"Also please advise whether or not the county can legally pay the court costs and damages that may be awarded in the cases into the probate court and whether or not the county can pay the nominal consideration or such consideration as may be agreed upon by the governing body of the county to the property owners for deeds?

"Also please advise me whether or not the Town of Vina may pay the damages, if any, awarded in its cases?

"If the Town of Vina should fail or refuse to pay the damages and court costs in the cases prosecuted by it to condemnation of the right-of-way within the corporate limits of said Town, may the county legally pay the same?

"I would appreciate your opinion in this matter at your earlies convenience."

1. Title 23, Section 25, Code of Alabama 1940, as amended by Act No. 283, General Acts 1949, page 407, with supplied emphasis, reads:

"The right of way deemed necessary by the highway department for a state road, or bridge, constructed under the provisions of this chapter, shall be acquired by the county or municipality in which such road or bridge is to be located, and **the entire cost thereof paid by the state.** Should the county or municipality fail or refuse to acquire the necessary right of way, the state director of the highway department shall have authority to acquire such right of way either by purchase or by the exercise of the right of eminent domain in condemnation proceedings as provided under the laws of this state."

Section 25, supra, as amended, expressly places upon the county and municipality, or either or both, the duty and responsiblity of acquiring the right of way deemed necessary by the State Highway Department for the construction of state highways. The fact that the entire cost thereof must be paid by the state does not relieve counties and municipaliies of their responsibility for acquiring such right of way. If unable to acquire by negotiation and purchase, the county or municipality must institute condemnation proceedings as has been done in the case you present. The parties to such proceedings are the county and the municipality, or either or both, and the individual property owners whose property is sought to be condemned. Although the state, by virtue of the express language of Section 25, as amended, supra, underwrites the entire cost of obtaining the right of way, the state itself is not a party to such proceedings unless the the county or municipality has failed or refused to acquire the right of

way and the state has, in its own name and upon its own initiative, instituted condemnation proceedings because of the failure of such county or municipality to acquire such right of way.

Therefre, I am of the opinion that such decrees as are entered by the probate court in such proceedings must run against a party or parties to the action. Since you advise that in this case the proceedings were instituted by the county, against which damages have been awarded, the decree should run against the county. In such case the county or municipality acts as disbursing agent for the cost of the right of way, said county or municpality to be reimbursed by the state for the entire cost thereof. Alhough the 1949 amendment relieves counties and municipalities of the ultimate financial burden, it does not relieve them of their duty of acquiring the right of way and temporarily financing its cost. I am of the further opinion that the State Highway Department should not be required to pay the funds representing such costs into the probate court prior to rendition of the decree.

2. Your second question is answered in the affirmative. Section 25, as amended, supre, places upon the county and municipality, or either or both, the affirmative duty of acquiring the right of way. That section contemplates that the county or municipality perform and discharge the necessary mechanics and administrative details and temporarily finance the cost of acquiring the right of way, the said county or municipality later to be reimbursed by the state for the entire cost thereof. While they may advance payment of such costs, and indeed must advance such costs, the state, upon accepting the rght of way, must assume the full financial burden of such costs by reimbursing the county or municipality therefor. However, if the right of way was, in whole or in part, acquired prior to July 26, 1949, the effective date of Act No. 283, supra, it is my opinion that the cost of such footage as was acquired prior to that date should be paid one-half by the county or municipality and one-half by the state. See Act No. 527, General Acts 1943, page 492.

3. Your third question has been answered above.

4. Your fourth question is answered in the negative.

The duty of acquiring the right of way rests equally upon the county and municipalities through which the highway will run. Municipalities are, by Section 25, as amended, supra, made responsible for acquiring such parts of the right of way as lie within their corporate limits. They are not concerned with those parts which lie without, nor is the county concerned with those parts which lie within. Should a municipality fail or refuse to acquire the necessary right of way, the state director of the highway department must acquire the same either by purchase or by eminent domain. In my opinion, the statute does not anticipate that counties advance the costs of acquiring rights of way within the corporate limts of municipalities.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 11, 1950

Hon. H. M. Brittain
Judge of Probate
Randolph County
Wedowee, Alabama

Filing Tax—Mortgages—Probate Judges—Taxation.

1. A county in which a mortgage, deed of trust, contract of conditional sale, or other instrument of like character is filed for record is not entitled to part of the tax collected thereon unless the property or a portion thereof described in said instrument was situated in said county at the time said instrumnt was first filed for record and the tax thereon paid to the Probate Judge.

2. The Probate Judge of a county in which a mortgage, deed of trust, contract of conditional sale, or other instrument of like character is filed for record is not entitled to receive five percent of the taxes due thereon, when said instrument has previously been filed for record in another county and the taxes due thereon paid to the Probate Judge of that county and same has been certified.

Opinion by Assistant Attorney General Johnson.

Dear Sir:

Your request for an official opinion, bearing date of June 15, 1950, is as follows:

"For many years past mortgages have been filed by some of the large corporations in several counties of the state. In each instance the filing tax has been collected in one county and later when this mortgage has been filed in the other counties the records of these counties have shown the filing tax as exempt and no part of the tax paid by the first county of record has ever been received by any of the other counties.

"Due to the procedure set out above the general fund of each of the counties in which the mortgage was filed other than the original county where filed no tax has been paid into the general fund nor has the Probate Judge of those counties been able to collect anything for remitting to the state and county the part of the tax that as I see it should be paid into the general fund of each of the other counties.

"Please give me your opinion as to whether or not each county in which a mortgage is recorded should receive their pro rata part of the filing fee for deposit to the general fund of these counties and whether or not the Probate Judge of each of these counties should receive his 5% commission on remitting their part of the tax to the state and county."

Title 51, Section 619 (e), Code of Alabama 1940, provides in pertinent part as follows:

> "Upon the filing for record of such mortgage, deed of trust, contract of conditional sale, or other instrument of like character, the person to whom the same shall be made payable, or his agent shall present the said insrtument to the judge of probate of the county in which the property conveyed thereby, or any part thereof is situated, and shall pay to the probate judge the amount of the tax required under this section to be paid upon such mortgage, deed of trust, contract of conditional sale, or other instrument of like character, and upon such payment the probate judge or his clerk shall certify on said mortgage, deed of trust, contract of conditional sale, or other instrument of like character, the fact that the said tax has been paid and when so certified by the probate judge or his clerk, such instrument shall be admitted to record in any county wherein any of the property mentioned in said instrument is situated, without the payment of any further tax thereon, . . ."

The above quoted section exempts from tax all mortgages and instruments of like character filed for record in a county wherein any of the property mentioned in said instrument is located, when said instrument has been filed for record in another county and the required tax thereon has been paid and so certified by the probate judge or his clerk, in said county.

Title 51, Section 619 (g), Code of Alabama 1940, sets out what disposition is to be made of the taxes collected under Title 51, Section 619. It is deemed expedient to quote this section in its entirety, which is as follows:

> "Of the taxes collected by the probate judge under this section there shall be paid to the county treasurer of the county in which such taxes are collected one-third of the amount collected by him, to be accounted for by him and the remaining two-thirds of said amount collected, to the state treasury. The probate judge shall receive five per cent of the amount collected by him as compensaton for his services in collecting said money, and certifying said instrument, said five per cent to be retained by him out of the money collected by him under this section; but when the property described in said instrument is situated within different counties within this State, then the probate judge who collects said taxes shall pay over the amount due to the county, to the county treasurer of each of the different counties in which said property is situated an amount of said taxes that would be in proportion to the value of the property therein as compared to the value of the whole property within this state described in said insrument."

In answer to your first inquiry, I advise you that the county in which a mortgage, or other like instrument is filed for record is not entitled to part of the taxes collected unless the property or a portion thereof was

situated in said county at the time the instrument was first filed for record and the tax thereon paid to the probate judge. In the event a portion of the property described in said instrument is located in a county, other than the county in which said instrument is filed for record and the tax thereon paid, then the county in which a portion of the property described in said instrument is located is entitled to its pro rata share of the taxes collected whether said instrument is filed for record in said county or not.

It is my opinion that your second question should be answered in the negative.

Section 619 (e), supra, clearly states that the probate judge shall receive five per cent of the amount collected by him as compensation for his services **in collecting said money and certifying said instrument.** The five per cent of the amount collected is not paid the probate judge for remitting two-thirds of the tax collected to the Stae, as suggesed in your request, but as compensation for his services in collecting said tax and certifying said instrument. It is obvious that the tax is collected only one time, that being at the time said instrument is first filed for record. The same is true as to certifying said mortgage or instrument of like character. Therefore, the five per cent compensation is collectible only once and that by the probate judge who collects the tax due on said mortgage or instrument of like character and who certifies same.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 11, 1950

Hon. J. D. Harris, Mayor
City of Phenix City
Russell County
Phenix City, Alabama

Poll Tax—Municipalities—Elections—Ballots—Candidates.

1. The exemption from poll tax on account of disability, provided for in Title 51, Section 238, Code of Alabama 1940, must be claimed annually by the person seeking the same.

2. A person, otherwise subject to the payment of poll tax, who fails to claim exemption therefrom on account of disability, as provided by Section 238, supra, annually, or to pay said tax, is not a qualified elector.

3. A person must be a qualified elector in order to qualify as a candidate for mayor, councilman, or city commissioner.

4. An officer charged with the duty of printing ballots for an election need not proceed blindly, and if it plainly appears to him, even as a ministerial officer, that a person seeking to have

his name printed on the ballot as a candidate for office is not, in fact, qualified to be such a candidate, he has the right to decline to print his name on the ballot.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an offcial opinion, bearing date of September 9, 1950, is as follows:

"As Ex-Officio Mayor and President of the City Commission of Phenix City I respectfully request your official opinion as to whether or not the name of one Archie Carey Funderburke should be printed as a candidate on the ballots to be used in our General Municipal Election here on Monday, September 18, 1950.

"Our present Commission form of government for the City of Phenix City was established by Local Act No. 236 of the Regular Session of the 1947 Legislature. See Local Acts 1947, pages 137-144.

"Section 2 of said Act divides the City of Phenix City into five City Commission districts.

"Section 7 of said Act provides that each member of said Commission shall be a **qualified elector** of said City and shall reside in the respective districts which they shall represent on said Commission, and to which they shall have been elected by the qualified elector of said City.

"Section 9 of said Act provides: 'Section 9. In all elections each office of member of said Commission to be filled shall be designated Member of City Commission being designated as such for commission districts number 1, 2, 3, 4, and 5, respectively, and this shall be shown on the ballot prepared for such election. In filing statement of candidacy each candidate shall designate for which commission district he desires election. At every election each voter shall vote for only one candidate for each office and the candidate receiving the highest number of votes for such office shall be elected, provided he receives a majority of all votes cast for such office. In case no one of such candidates shall receive a majority of such votes cast for the office for which he is a candidate another election shall be held on the same day of the following week for said office at which the two candidates receiving the highest number of votes at the initial election for said office shall be voted for. The candidate receiving the highest number of votes at such final election shall be declared elected. Each candidate for membership of said Commission shall file declaration of candidacy at least Twenty days before the general election, stating name, office for which he is a candidate, and signed by at least One Hundred qualified electors of said City.

"Section 10 of said act provides: 'Section 10. The City Commission created by this Act shall have, possess and exercise the municipal powers, legislative, executive and judicial, now or hereafter conferred upon municipal governmental bodies and all laws governing the City of Phenix City, and not inconsistent with the provisions of this Act, shall apply to and govern said City after it shall become organized under the Commission form of government provided by this Act. All laws, ordinances and resolutions lawfully passed and in force in Phenix City under its former organization, not inconsistent with the with the provisions of this Act shall remain in force until altered or repealed according to the provisions of this Act. All employees and all officers whose terms of office are abolished by this Act shall continue to hold office until otherwise provided for by said City Commission.'

"Title 37, Section 403, Code 1940, provides: 'Every mayor, councilman and officer elected by the whole electorate of the city or town shall be a resident and **qualified elector** of the city or town in which he shall have been elected, and shall reside within the limits of the city or town during his term of office. The councilmen shall be qualified electors of said city or town, residing within the limits of the ward from which they shall have been elected, and shall reside within the limits of said ward during the term of his office.'

"I am further advised by our City Attorney, Circuit Solicitor and other practicing attorneys at law that no person is qualified to be a candidate for any public office unless that person is a **qualified elector.**

"Section 178, Constitution of 1901 provides: 'To entitle a person to vote at any election by the people, he shall have resided in the State at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and **shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year;** provided, that any elector who, within three months next preceding the date of the election at which he offers to vote, has removed from one precnct or ward to another precinct or ward in the same county, incorporated town, or city, shall have the right to vote in the precinct or ward from which he has so removed, if he would have been entitled to vote in such precinct or ward but for such removal.'

"Section 238, Title 51, Code of 1940 provides: 'The follolwing persons shall be exempt from poll tax: **All persons permanently and totally disabled from following any substantially gainful occupation with reasonable regularity, and whose taxable property does not exceed five hundred dollars, provided that proof of such disability is made to the probate judge of the county in which such person resides be-**

tween October the first and the following February the first. And the name of no such exempt person shall be placed on the list of qualified voters after the first day of February and before the first day of the next October. All persons who honorably served in the military or naval service of the United States between January 1, 1917 and November 11, 1918 shall not be required to pay poll taxes. The Judges of probate shall issue certificates of exemption from the payment of such poll taxes to the persons entitled thereto under such rules and regulations as may be prescribed by the governor. Every officer and enlisted man of the national guard or naval militia of Alabama shall be exempted from poll taxes during his active membership and every person who shall have served an aggregate of twenty-one years in the active national guard or naval militia of Alabama shall be exempt from poll tax. The certificate of exemption shall be obtained as provided for in section 11 of title 15 of this Code. (Ib.; 1936-37, Ex. Sess., p. 95.).'

"Section 243, Title 51, Code of 1940 provides: 'After the first day of February and before the first day of Next October, the tax collector shall have no authority to receive or receipt for poll taxes due by any person.'

"Section 171, Title 17, Code of 1940 provides: 'In case of any municipal election held at a time different from a general state or federal election, the duties herein prescribed for the judge of probate in respect to receiving nominations, printing and distributing ballots and cards of instructions shall be discharged under the same sanctions by the mayor or other chief executive officer of the city or town.'

"According to the registration books prepared and kept by the County Board of Registrars for Russell County Archie Carey Funderburke was born November 15, 1916. These books further show that he registered as a voter on November 22nd, 1937, after having secured a certificate of exemption from the payment of poll taxes for that year from the judge of probate upon the grounds that he was then permanently and totally disabled from following any substantially gainful occupation with reasonable regularity and that his taxable property did not then exceed $500.00. At no time since November 22, 1937, has Mr. Funderburke made any proof whatever of such disability to the probate judge of this County, nor at any time since November 22, 1937, has the judge of probate of this County issued a certificate of exemption from the payment of poll tax to Mr. Funderburke.

"Furthermore, records of the Tax Collector for Russell County show that Mr. Funderburke has never paid any poll tax for any year since he registered as a voter on November 22, 1937.

"Records in the Tax Assessor's Office for Russell County show that on October 7, 1941, Mr. Funderburke had a four-room house and lot here in Phenix City assessed for taxation at a value of $600.00.

Records in the Tax Assessor's Office for Russell County further show that in each year since 1941 up to and including the present tax year Mr. Funderburke has assessed this property for taxation at a value of $600.00. Records in the office of the Probate Judge of this County show that Mr. Funderburke owned a life estate in said property from March 12, 1941 to February 27, 1945, and that since February 27, 1945, he has owned a fee simple title to said property. Records in the Probate Office of this County further show that the value of this property is certainly more than $500.00 since he recently secured a loan in amount of $2120.00 by placing a mortgage for that amount on said property, which said mortgage is recorded.

"It is a matter of common knowledge here that for several years now Mr. Funderburke has followed a substantially gainful occupation with reasonable regularity as a salesman for a wholesale grocery company.

"All the above facts seem to be admitted freely by Mr. Funderburke, but he seems to contend that the fact that he made proof of disability to the Probate Judge of this County on or about November 22, 1937, still entitles him to have his name placed on the list of qualified voters for this County and City. He seems of the further opinion that the certificate of exemption from the payment of poll tax issued him by the Judge of Probate on or about November 22, 1937 has exempted him from the payment of poll tax from that date up to the present date.

"Therefore, in the view of the above cited facts there is considerable question in my mind as to whether or not Mr. Funderburke is a **qualified elector.**

"I furthermore entertain considerable doubt, in view of the above-stated facts, as to whether or not I am authorized, empowered, required or privileged to have the name of Mr. Funderburke printed on the ballots to be used in the coming election, even though he filed declaration of his candidacy within time specified by Section 9 of Local Act quoted above.

"Thus, I hereby respectfully and urgently request your official opinion as to whether or not, under the facts as stated, Mr. Funderburke should be considered a qualified elector and as to whether or not I, acting as Mayor and Chief Executive officer of the City of Phenix City under the provisions of Section 171, Title 17, Code of 1940, should have the name of Mr. Funderburke printed as a candidate on the ballots to be used in the coming election.

"I have promised Mr. Funderburke that I would endeavor, if at all possible, to discover the correct and official legal answers to these questions by the time our City Commission meets here on Tuesday, September 12th. In view of this assurance which I have made to Mr. Funderburke, and to various qualified electors of this City who

are intensely interested in the matter, and in further view of the fact that the time for having the ballots for said election printed is becoming extremely short, I shall deeply appreciate the very quickest answer and opinion you will be so kind as to furnish me on these questions."

I am of the opinion that the person mentioned in your letter of inquiry, under the facts stated by you therein, is not a qualified elector.

One of the requirements for a qualified elector in this State is the payment "on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year." Constitution of Alabama 1901, Section 178. The poll tax mentioned in said section is one dollar and fifty cents per year on each inhabitant in this State, over the age of twenty-one years, and under the age of forty-five years, who is not exempted therefrom as provided by law, which poll tax becomes due and payable on the first day of October in each year, and becomes delinquent on the first day of the next succeeding February. Constitution of Alabama 1901, Section 194; Title 51 Section 237, Code of Alabama 1940. After the first day of February and before the first day of the next October, the tax collector has no authority to receive or receipt for poll taxes due by any person. Title 51, Section 243, Code of Alabama 1940.

There are certain persons who are exempt from the payment of poll tax, among them being "All persons permanently and totally disabled from following any substantially gainful occupation with reasonable regularity, and whose taxable property does not exceed five hundred dollars, provided that proof of such disability is made to the probate judge of the county in which such person resides between October the first and the following February the first." Title 51, Section 238, Code of Alabama 1940. This section also provides that "the name of no such exempt person shall be placed on the list of qualified voters after the first day of February and before the first day of the next October." This exempting provision has read as it now reads since February 9, 1937, the date of the approval of Act No. 84, General Acts 1936-37, page 95, which amended Section 2 of the 1935 General Revenue Act, approved July 10, 1935. Prior thereto, it merely provided for exemption from poll tax of "all persons permanently disabled whose taxable property does not exceed five hundred dollars." See Section 2(g) of the 1935 General Revenue Act (Act No. 194, General Acts 1935, page 256), and Section 3022, Subsection (7), Code of Alabama 1923. This office, in construing this exempting provision prior to the 1937 amendment uniformly held that the exemption must be claimed each year. See Biennial Report of Attorney General, 1930-32, page 844; Quarterly Report of Attorney General, Vol. 6, page 70 and Biennial Report of Attorney General, 1936-38, page 110. The theory of these opinions was that, since a disabled person was only entitled to the exemption in the event his taxable property did not exceed five hundred dollars, the exemption would have to be claimed each year, because the value of his taxable property might change each year. If those opinions

were correct under the exempting provision as it then read, and I think they unquestionably were correct, then there can be no doubt whatsoever that a person must claim his exemption each year, in order to be entitled thereto, under the exempting provision as the same now reads, and I so hold.

It is my further opinion that a person must be a qualified elector in order to qualify as a candidate for mayor, councilman, or city commissioner, either under the local law pertaining to the city of Phenix City (Act No. 236, Local Acts 1947, page 137) or under the general law. Section 7 of said act provides:

> "That each member of said Commission shall be a qualified elector of said City and shall reside in the respective districts which they shall represent on said Commission, and to which they have been elected by the qualified electors of said City."

Section 9 of said act provides:

> ". . . Each candidate for membership of said Commission shall file declaration of candidacy at least Twenty days before the general election, stating name, office for which he is a candidate, and signed by at least One Hundred qualified electors of said City."

The Supreme Court of Alabama, in construing a like provision dealing with the qualifications of mayors, councilmen, etc., generally (then Section 1761, Code of Alabama 1923, and now Title 37, Section 403, Code of Alabama 1940), held that a person, in order to be qualified for such an office, must be a qualified elector at the time of the election. See **Huey v. Etheridge,** 234 Ala. 264, 175 So. 268. To like effect is the case of **Davis v. Teague,** 220 Ala. 309, 125 So. 51, construing Section 2575, Code of Alabama 1923 (now Title 41, Section 5, Code of Alabama 1940), which deals with persons who are ineligible to and disqualified for holding office under the authority of this State. The court there quoted with approval from the earlier case of **Shepherd v. Sartain,** 185 Ala. 439, 64 So. 57, the following observation in respect to the first six subdivisions of that section:

> " 'It is settled in this state, in harmony with reason and the weight of judicial authority, that "ineligible" here means inelectable—that is, not capable of being chosen—and hence the qualifications enumerated relate to the date of election, and not merely to the date of actual induction into office.' "

I have previously pointed out that the person mentioned in your letter of inquiry, under the facts stated therein, is not a qualified elector and that he may not become a qualified elector before October 1, 1951. I now hold that he is not qualified to be a candidate for the city commission of the city of Phenix City for the reason that he is not a qualified elector.

Section 10 of said act makes all provisions of the general laws of the State in regard to municipalities which were applicable to the city of Phenix City prior to the passage of said act applicable thereto after its passage, unless they are inconsistent with the provisions thereof. Since there are no provisions of said act governing the matters here under consideration, other than those quoted above, we must turn to the general law.

Title 17, Section 171, Code of Alabama 1940, provides:

> "In case of any municipal election held at a time different from a general state or federal election, the duties herein prescribed for the judge of probate in respect to receiving nominations, printing and distributing ballots and cards of instructions shall be discharged under the same sanctions by the mayor or other chief executive officer of the city of town."

Under this section, it is your duty, as mayor, to print and distribute ballots for the forthcoming general election in your city. See **Walker v. Junior**, 247 Ala. 342, 24 So. 2d. 431.

While your duties in this respect are ministerial yet you need not proceed blindly, and if it plainly appears to you that the person referred to in your letter of inquiry is not, in fact, qualified to be a candidate for the city commission of Phenix City, Alabama, in my opinion you have the right to decline to print his name on the ballot.

As I read the case of **Kinney v. House**, 243 Ala. 393, 10 So. 2d. 167, it is apt authority for this conclusion. In that case, petitioners sought mandamus to have the judge of probate of Cullman County place their names upon the printed ballot for the general election on November 3, 1942, as candidates of the Republic Party for the several officers for which they claimed to have been nominated. It was insisted that the judge of probate, in so having the ballots printed, acted in a ministerial capacity and was without authority to question the right of the petitioners in that respect. In disposing of that insistence, the court said:

> ". . . In Section 145 of Title 17, Code 1940, the Judge of Probate is to print the names of the candidates on the ballots but there is no provision that a certificate of nomination shall be conclusive. The certificate in the instant case is equivocal to such an extent as to put the Probate Judge upon inquiry that the nominations were not in accord with the statute. **The Probate Judge need not proceed blindly in printing the ballots and if it plainly appears to him, even as a ministerial officer, that the nominations were contrary to the mandatory provisions of the statute, we think he had the right to decline to print the names on the ballot and leave the matter for the courts.** The case of Walling v. Lansdon, 15 Idaho 282, 97 P. 396, is here much in point. The substance of the holding in this respect is found stated in the note to 29 C. J. S., Elections, 88, p. 121 as follows: 'Where matters pertaining to nominations are regulated by statute, questions of

compliance with the statute and infringement of the legal rights conferred are judicial; and the courts are not ousted of jurisdiction or bound by the decisions of party authorities with regard thereto.' And as said in 29 C. J. S., Elections, § 162, p. 239: 'Mandamus will not issue to compel the placing on the ballot of names of persons not with the significant omission entirely of the time when the nomination presented to the Probate Judge, as we have indicated, is ambiguous and indicates that the nominations were made by committees with the significant omission entirely of the time when the nomination was made. **With the statute hereinafter referred to before him, the Probate Judge, even acting in a ministerial capacity, had the right to make further inquiry to ascertain if the statute had been complied with.**" (Emphasis supplied.)

Specifically answering your inquiries, I advise you:

1. That the person mentioned in your letter of inquiry, under the facts stated by you therein, is not a qualified elector, and for this reason he is not a legally qualified candidate for the city commission of the city of Phenix City, Alabama, in the forthcoming municipal general election to be held therein.

2. That, these facts plainly appearing to you, you have the right to decline to print his name on the ballot to be used in said election.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 11, 1950.

Hon. J. W. Stuart,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

Elections—Gasoline—Taxation—Jackson County.

Act No. 589, General and Local Acts 1949, page 915, authorizing the governing body of Jackson County, Alabama, to call an election for the purpose of determining the levying of a certain excise tax on gasoline and other motor fuels, contemplates only one election.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of August 14, 1950, is as follows:

"At the 1949 session of the Legislature a local act was passed for Jackson County (Acts 1949, Page 915). This act authorized the Commissioners of the county to call an election for the purpose of levying a 2c gasoline tax in Jackson County.

"An election was called and held on December 13, 1949 at which time a majority of voters voted no. Thereafter, a second election was called and held on August 8, 1950 at which second election a majority of the voters also voted no.

"I desire an official opinion from you as to whether or not a third election can be called and held under the provisions of this act which would be binding and legal."

In answer to your inquiry, I am of the opinion that Act No. 589, General and Local Acts 1949, page 915, authorizes the calling of only one election, which has heretofore been held in November, 1949.

The title of the act in question, viz., Act No. 589, supra, refers to the authority of the governing body of Jackson County, Alabama, "to call an election" for the purpose of determining the levying of a certain excise tax on gasoline and other motor fuels.

Section 1 of said act provides as follows:

"The governing body of Jackson County, Alabama, is hereby authorized to call **an election** of the qualified voters of said County for the purpose of determining whether or not there shall be imposed an excise tax of 2c per gallon upon gasoline or other motor fuels in said County. Due notice of said election shall be given at least thirty days prior to the date the election is called. **Said election** shall be held and conducted under the same rules and regulations now governing general elections in Alabama, and the officers holding the same shall receive the same compensation." (Emphasis supplied.)

In Section 3 of this act, reference is made to "said election." Nowhere else in the act is mention made of the election.

It will be noted from the above that where the act under consideration refers to "election," the singular is used, both in the body and the title. Also, in an advisory opinion of the Supreme Court, which upheld the constitutionality of Act No. 589, supra, reference was made to "the election," in the singular. See **In Re Opinion of the Justices**, 252 Ala. 561, 42 So. 2d 81.

In my opinion, it was the legislative intent that only one election was contemplated to determine the issue of the authority of the county governing body to levy the tax in question. It cannot logically be contended that such an election could be called as many times as may suit the whim of the county governing body. If such be the case, a ridiculous situation could arise. An election could be held every day, week, or month, with a

different result each time, and the tax could or could not be levied accordingly.

Since only one election is authorized, which was held in November, 1949, there is no authority for calling subsequent elections under the act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 11, 1950.

Hon. Leon E. Moody,
Superintendent,
Lawrence County Schools,
Moulton, Alabama.

Counties—Schools—Elections—Taxation—Lawrence County.

Under the provisions of Amendment XX, Constitution of Alabama 1901, and Title 52, Section 235, Code of Alabama 1940, a special election may be held at this time to determine whether or not a certain tax for school purposes may be levied and collected in certain school districts in Lawrence County, although there has heretofore been an election held under said amendment authorizing the levying and collection of such a tax, which has now expired.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of August 30, 1950, is as follows:

"The trustees of the Hazelwood High School, Town Creek, Alabama, are desirous of perfecting some means of borrowing money with which to erect a gymnasium and other needed buildings. In the 1923 Acts, page 751, an election was authorized proposing an amendment to the Constitution whereby Town Creek School District 59, with other districts in Lawrence County, could levy a five-mill special school district tax. This Amendment, which is Number Twenty to the 1901 Constitution, was ratified in November, 1924, special election was held and tax went into effect about the tax year 1926. This tax was collected for a period of fifteen years through 1940, and then discontinued.

"May the County Board of Revenue at this time reinstate this special tax and levy it for an indefinite period of time? If not, may a special election be held at this time under the above amendment to

the Constitution in School District 59 to determine whether said tax may be reinstated?"

I am of the opinion that the first part of your inquiry should be answered in the negative. However, in answer to the second part of your inquiry, I am of the opinion that a special election may be held at this time under the above amendment to the Constitution to determine whether said tax may be again levied, but not reinstated.

Amendment XX, Constitution of Alabama 1901, which was proclaimed ratified on November 15, 1924, provides as follows:

"Town Creek school district No. 59, Landersville school district No. 23, and Moulton school district No. 28, in Lawrence county, Alabama, shall each have the right and power by vote of a majority of the qualified electors of such district at an election held for that purpose to levy and collect for the purpose of acquiring, constructing, or repairing of school buildings in such districts or paying for school buildings already built, a tax of not over five mills in any one year, in addition to all other taxes now authorized by law. The election in such district to determine whether or not such tax shall be levied shall be called, held and conducted as now provided by law for calling, holding and conducting of elections to determine whether or not a three-mill district school tax shall be levied and collected."

It appears from the facts set out in your letter that a tax has heretofore been levied and collected under the above amendment for a period of fifteen years through 1940 and then discontinued. I know of no authority to reinstate the tax.

The question then presents itself as to whether there can be another election held under this constitutional amendment. In my judgment, this query should be answered in the affirmative, notwithstanding that in said amendment when reference is made to "election" the singular is used. Title 52, Section 235, Code of Alabama 1940, provides as follows:

"§ 235. Elections.—**Elections for the purpose of voting special taxes for any school purpose or for school purposes generally under the constitution may be held at any time in accordance with law for one or more of the following purposes: (1) Voting such tax where no such tax is being levied,** (2) voting such tax for a period additional to the period for which the tax then being levied has been voted, (3) voting an additional rate of such tax where such tax has been voted at a rate less than the limit permitted by the constitution, (4) voting such tax for a different purpose from that for which the tax has already been voted and beginning with the fiscal year after such election, the purpose of the new election shall govern, provided the change of purpose for which a tax is voted shall not deprive the holders of outstanding warrants of their rights, or (5) voting such tax for the purpose of consolidation or enlargement of special tax district, provided that the holders of outstanding warrants shall not

be deprived of their rights. No election for the voting of the tax shall be held which would authorize the tax for a period or aggregate periods which would cause the tax to become due and payable later than thirty years from the October first next after such election. All warrants heretofore or hereafter issued as preferred claims against a special tax under the constitution shall continue such claims against such tax until paid, whether such tax was voted at one time or from time to time and whether such tax was voted at the time the warrants were issued or thereafter. All elections in school districts or counties which prior to June 25, 1940 have been held for the purpose of authorizing a special tax for any school purpose or for school purposes generally under the Constitution, which said election resulted in a majority of the votes cast being in favor of the said tax and which said elections were irregular by reason of failure prior to the actual holding of the election to give notice thereof in a newspaper or by reason ratified and confirmed and given effect in all respects as if all provisions of law relating to such election had been duly and legally complied with and the said tax may be levied and collected accordingly." (Emphasis supplied.)

There is at present no tax being levied under Amendment XX, supra. Under the provisions of Title 52, Section 235, supra, authority is given for the calling of another election, under Amendment XX, supra, at the present time.

In an opinion of this office rendered to the Judge of Probate of Butler County, Alabama, on May 13, 1941 (Quarterly Report of Attorney General, Volume 23, page 138), in construing Amendment III, Constitution of Alabama 1901, which authorized the calling of an election for the purpose of levying a special county tax for school purposes, together with Section 20 of Act No. 186, General Acts 1939, page 334, approved March 15, 1939, which was the forerunner of the first portion of Title 52, Section 235, supra, it was held that a second election could be held to continue a tax then in existence and which had not expired. In the instant case, there is no tax now being levied under Amendment XX, supra, and by the specific authority of Section 252, Title 52, supra, an election is authorized to be held at the present time pursuant to said amendment.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 11, 1950.

Hon. M. G. Hale, Chairman,
Colbert County Board of Revenue,
Tuscumbia, Alabama.

Counties—Condemnation—Eminent Domain — Drainage Districts.

Authority to counties to condemn land for purpose of establishing drainage district for control of malaria is granted by Title 12, Section 197, Code of Alabama 1940.

Such proceedings should be conducted under the provisions of Title 19, Chapter 1, Code of Alabama 1940.

Opinion by Assistant Attorney General Johnson.

Dear Sir:

Your request for an official opinion, bearing date of June 22, 1950, is as follows:

"Please refer to Amendment No. 45 to the Constitution of Alabama, which relates to drainage districts in Colbert County.

"You will note that the Court of County Commissioners of Colbert County was authorized to divide said County into drainage districts for the control of malaria and that the County was authorized and empowered to levy and collect in the several districts so formed a special tax to be used exclusively for the control of malaria in the drainage district. An election was held in Drainage District No. 1 in said County and the tax and drainage program was authorized at said election.

"The County is engaged in a drainage program for the control of malaria in said Drainage District No. 1. The Board of Revenue of the County has been unable to secure a right of way from a certain property owner over whose lands it is necessary and desirable to dig a ditch for said drainage purpose, and it may be necessary to acquire said right of way over said land by condemnation proceedings or abandon that part of the drainage project where said land is located.

"The Board of Revenue has not authorized a condemnation proceedings as to this land but has the matter under consideration and it is important for the Board of Revenue to know whether the County, through its Board of Revenue, has the authority to institute and conduct a condemnation proceedings for the purpose of acquiring the right of way over said land.

"Please advise us whether this authority if conferred by law upon the Board of Revenue of Colbert County, and please refer us to the law under which the condemnation proceedings would be conducted."

Your question numbered one is answered in the affirmative.

Title 12, Section 197, Code of Alabama 1940, grants authority to counties to condemn land for any public use.

Answering your second inquiry, you are advised that condemnation proceedings in this instance should be conducted under the provisions of Title 19, Chapter 1, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 15, 1950.

Hon. D. E. Marley,
Director of Commerce,
Department of Commerce,
CAPITOL.

Employees' Retirement System.

Any member of the Employees' Retirement System who has attained, or will attain the age of seventy years or above, on or before October 1, 1950, may be continued in service after that date, provided: That application is made by the employee to be continued in service; that such application is approved by the head of the department in which such member is employed and by the Board of Control; and that evidence of physical and mental fitness is furnished.

Opinion by Assistant Attorney General Johnson.

Dear Sir:

Your request for an official opinion, bearing date of August 21, 1950, is as follows:

"With further reference to our conversation of even date relative to the legality of endeavoring to keep Mr. G. H. Foote, Chief Examiner of this Department, after October 1 since he will have already arrived at the age of seventy prior to October 1, the present termination date of employment, it will be appreciated if you will give us an official opinion on this subject.

"Our discussion this morning related particularly to Sub-Section C of Section 460, Title 55, 1940 Code of Alabama as found in the 1949 Cumulative Supplement to Volume Eight."

In answer to your inquiry, you are advised that any member of the Employees' Retirement System who has attained, or will attain, the age of seventy years or above, on or before October 1, 1950, may be continued in service after that date, provided: That application is made by the employee to be continued in service; that such application is approved by the head of the department in which such member is employed and by the Board of Control; and that evidence of physical and mental fitness is furnished.

Your inquiry requires an interpretation of Section 5(C) of Act No. 515, General Acts 1945, page 734, as amended by Section 4 of Act No. 606, General Acts 1947, page 445, which reads as follows:

> "(C) Any member in service who has attained age seventy shall be retired forthwith, except that any member who is an official appointed for a term of years may remain in service until the end of the term of office for which he was appointed, and except that during the first five years after establishment of the retirement system, a person who shall have attained the age of seventy or above may be continued in the State service, on application of the employee approved by his department head, and by the Board of Control, if evidence of physical and mental fitness is furnished; provided nothing in this Act shall require the dismissal of any person seventy years old or over who fails to join the retirement system within the time specified in this act if such person was in the employ of the State on June 1, 1945."

As I read the above quoted section, retirement from service is compulsory for members of the Employees' Retirement System upon their attaining the age of seventy years, with two exceptions: First, any member who is an official appointed for a term of years may continue in service until the end of the term for which he was appointed; and, second, any member who shall have attained the age of seventy years or above, during the first five years after the establishment of the Retirement System, may be continued in service provided that he makes application to be continued; the application is approved by his department head and by the Board of Control; and evidence of physical and mental fitness is furnished. The date of establishment is expressly designated by Section 2 of Act No. 515, supra, as October 1, 1945.

Accordingly, I advise you that the employee referred to in your letter of inquiry comes within the second exception above and may be continued in service after October 1, 1950, provided he makes application to be so continued; his application is approved by the head of the Department of Commerce and by the Board of Control; and evidence of physical and mental fitness is furnished.

I am not unmindful of the contention that it is mandatory for all members of the Retirement System who have attained, or will attain the age of seventy years or above, on or before October 1, 1950, to be retired on that date. However, for the above quoted provision to support that contention it would have to read as follows, instead of the way it does read:

> Any member in service who has attained age seventy shall be retired forthwith, except that any member who is an official appointed for a term of years may remain in service until the end of the term of office for which he was appointed, and except that **a person who shall have attained the age of seventy or above may be continued in the state service during the first five years after estab-**

> lishment of the retirement system, on application of the employee approved by his department head, and by the Board of Control if evidence of physical and mental fitness is furnished; provided nothing in this act shall require the dismissal of any person seventy years old or over who fails to join the retirement system within the time specified in this act if such person was in the employ of the State on June 1, 1945.

It would have been a simple matter to have had this provision so read, if such had been the intention of the Legislature. However, it **does not** do so.

It is true that one of the fundamental rules of statutory construction is to ascertain and give effect, if possible, to the intention of the Legislature, and that the intention of the Legislature, when ascertained, is the law itself. However, there are certain other rules of statutory construction that must be considered in determining the legislative intent.

One of these is the rule that where the language of a statute is clear and the intent is obvious, there is no room for construction, and in such a case the language should be given the meaning therein plainly expressed, the court having discretion in construing statutes only where the meaning is doubtful. **City of Birmingham v. Southern Express Co.,** 164 Ala. 529, 51 So. 159; **L .& N. R. R. Co. v. Western Union Telegraph Co.,** 195 Ala. 124, 71 So. 118; **Kreutner v. State,** 202 Ala. 287, 80 So. 125; **Tucker v. McLendon,** 210 Ala. 562, 98 So. 797; **State v. Praetorians,** 226 Ala. 259, 146 So. 411; **Abramson v. Hard,** 229 Ala. 2, 155 So. 590; **State v. Tuscaloosa Building & Loan Association,** 230 Ala. 476, 161 So. 530; **Bozeman v. State,** 7 Ala. App. 151, 61 So. 604; cert. den. **Ex parte Bozeman,** 183 Ala. 91, 63 So. 201; **Daley v. State,** 13 Ala. 310, 69 So. 338; **State v. H. G. Fain Service Station,** 23 Ala. App. 239, 134 So. 119, cert. den. 220 Ala. 55, 124 So. 121.

It is a further well known rule of statutory construction that, even though the intention of the Legislature may be actually known to the courts, or may be shown to the courts, it cannot be carried into effect if the language used is not capable of carrying it into effect. Our Supreme Court has ably stated this rule in the following language from the opinion by Mr. Justice McClellan in the case of **Maxwell v. State,** 89 Ala. 150, 7 So. 825:

> "While there are circumstances under which the meaning of words will be enlarged or restrained, or even entirely disregarded, when the intent of the legislature, as gathered from the whole act and other acts in pari materia, renders it necessary, it would require a stronger case than is involved here, before we could feel authorized, . . . to say that they mean nothing by the very plain language they employ; and this though we might be morally certain, aside from the words, that the particular result was never in fact present in their minds. Of such case we adopt the language of Lord Campbell: 'I can not doubt,' said his Lordship, 'what the intention of the legislature

was; but that intention has not been carried into effect by the language used. It is far better that we should abide by the words of a statute, than seek to reform it according to the supposed intention.'—**Coe v. Lawrence,** 1 E. & B. 516."

Mr. Justice Haralson has ably spoken for the Supreme Court on this subject in the following language taken from his opinion in the case of **The State ex rel Robertson v. McGough,** 118 Ala. 159, 24 So. 395:

"But, there are other rules of interpretation that may override all others, as 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature . . . should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere.'—Cooley on Const. Lim. 69, 70 . . . 'We can only learn what they intended, from what they have said. It is theirs to command, ours to obey. When their language is plain, no discretion is left to us. We have no right to stray into the mazes of conjecture, or to search for imaginary purposes."—**Lehman v. Robinson,** 59 Ala. 241."

These were early expressions from our Supreme Court from which it has not departed.

When these rules of statutory construction are applied to the instant case, the conclusion here reached is inescapable.

Furthermore, any other construction would be contrary to the very laudable purpose of this law, and would amount to a construction of the same against, rather than in favor of, the employees, who constitute the class designated to be its primary beneficiaries.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 15, 1950.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Corporations—Names.

1. Under provisions of Sections 2 and 4, Title 10, Code of Alabama 1940, "Liberty National Life Insurance Company" and "Liberty National Finance Co., Inc." are so nearly similar as to lead to confusion; therefore, judge of probate should not record articles of incorporation for the latter company.

2. Payment made to probate judge under Section 6 and reported under Section 8 of Title 10, Code of Alabama 1940, should be returned under provisions of Title 51, Section 338, Code of Alabama 1940, when judge of probate does not record articles of incorporation.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of August 28, 1950, is as follows:

"There has been tendered to me for filing and record in the Probate Office of Tuscaloosa County a proposed charter or articles of incorporation for Liberty National Finance Co., Inc., which indicates an intention to engage in the finance business under the above name.

"It occurred to me that there might be some confusion between this proposed corporate name and Liberty National Life Insurance Company, which is a widely known Alabama corporation doing business all over the State of Alabama, engaging not only in the insurance business, but also in the finance business, as shown by various mortgages recorded in this office. This existing corporation is subject to State regulation as an insurance company and it is well known that it has many insurance policies in effect throughout Alabama.

"I note that Paragraph (1) in Section 2 of Title 10 of the Code of Alabama provides that a corporation shall not assume a name which is identical with that of any corporation already existing in this State, or so nearly similar thereto as to lead to confusion and uncertainty.

"Knowing the general habit and custom of referring to corporations and other businesses by abbreviated names such as 'First National' or 'City National' or 'Liberty National' or similar designation, —it occurs to me that the proposed charter might 'lead to confusion and uncertainty,' so that it may be my duty to decline to receive and record this proposed charter, thereby completing an incorporation in violation of Paragraph (1) of Section 2 referred to above.

"I will appreciate it if you will give me your opinion as to whether I should accept or reject this proposed charter, and request that you reply as soon as possible so that this matter may have prompt attention.

"The proposed charter has been filed (but not recorded) and the expenses paid and reported and remitted to the Secretary of State. What should I do?"

Subsection (1) of Section 2, Title 10, Code of Alabama 1940, provides in part that no name shall be assumed by a newly formed corpora-

tion which is identical with that of any corporation already existing in this State, or so nearly similar thereto as to lead to confusion and uncertainty. Section 4 of Title 10, Code of Alabama 1940, prohibits the judge of probate from recording the incorporation papers of a new company, unless they comply with Article 1 of Title 10, supra. The question is, therefore, whether "Liberty National Life Insurance Company" and "Liberty National Finance Co., Inc." are "so nearly similar . . . as to lead to confusion and uncertainty," thus necessitating the refusal of the judge of probate to record articles of incorporation for the latter company.

In **Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc.,** 123 F. 2d 582, it was held that under Title 10, Section 2, Code of Alabama 1940, a corporation doing an automobile insurance business in Alabama under the name of "Aetna Casualty & Surety Company" was entitled to an injunction against the use of the name "Aetna Auto Finance, Inc." by a local finance company furnishing insurance on automobiles in connection with loans to the owners thereof. See also **Harrison Transfer Co. v. Harris Transfer & Warehouse Co.,** 208 Ala. 631, 95 So. 12; **G. B. McVay & Son Seed Co. v McVay Seed & Floral Co.,** 201 Ala. 644, 79 So. 116; **Grand Lodge Knights of Pythias of North and South America v. Grand Lodge Knights of Pythias,** 174 Ala. 395, 56 So. 963.

In view of the above cited cases, it is my opinion that "Liberty National Life Insurance Company" and "Liberty National Finance Co., Inc." are so nearly similar "as to lead to confusion and uncertainty." It is my further opinion that by reason of Section 4, Title 10, Code of Alabama 1940, you should not record the articles of incorporation for the latter proposed company.

You state that you have already received payment as provided in Section 6, Title 10, Code of Alabama 1940, and that such payment has been reported and remitted as provided in Section 8 of the same Title. In my opinion, your action in reporting this money is in the nature of an overpayment, and is governed by Title 51, Section 338, Code of Alabama 1940. See Quarterly Report of Attorney General, Vol. 35, page 77. In the instant case, the money refunded to you by virtue of the last mentioned Code section should, of course, be paid over to the would-be incorporators.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 15, 1950.

Hon. Solon Gregg,
Superintendent of Education,
Marion County,
Hamilton, Alabama.

Schools—County Boards of Education.

1. The county board of education has the power to revoke appointments of school trustees previously made by the board

under the provisions of Title 52, Section 100, Code of Alabama 1940.

2. There is no time specified by law for holding an election for the nomination of school trustees. Since under the provisions of Section 100, supra, it is the duty of the patrons of the school to nominate the persons to be appointed as trustees, the time for holding the election (nomination) of such trustees is a matter to be determined by the patrons of the school and not by the county board of education.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, dated August 24, 1950, is as follows:

"Recently the Marion County Board of Education found it necessary to dismiss the local trustees of one of the schools in this county. There seems to be some controversy as to whether or not a board of education has this power.

"After referring to Title 52, Section 100, of the School Code of Alabama, 1940, I observe that as a general rule of law a board that has the power to make appointments also has the same power to revoke appointments, unless there is a law to the contrary.

It would be greatly appreciated if you would render for me the following interpretations:

"Is a local trustee of a school who is appointed by a board of education regarded as an officer?

"Does a board of education have the power to revoke appointments previously made by said board?

"If so, is there a time specified by law when another election should be held for the purpose of patrons nominating new trustees or is the time left to the discretion of the board of education?

"Your attention and cooperation will be greatly appreciated in rendering the above information."

In answer to your second inquiry, it is my opinion that the county board of education has the power to revoke appointments of school trustees previously made by the board under the provisions of Title 52, Section 100, Code of Alabama 1940.

In an opinion found in Biennial Report of Attorney General, 1928-30, page 307, which construed Section 133 of the Alabama School Code of 1927 (now Section 100, supra), it was said:

" * * * the County Board of Education may revoke the appointments (of school trustees) at any time, for, it is a general rule of law, that, where there is no provision to the contrary, the power to appoint to office carries with it the power to discharge therefrom."

See also the case of **Touart v. State**, 173 Ala. 453, 56 So. 211, in which it was held:

"It has been uniformly ruled that the power to appoint an officer carries with it, as an incident, in the absence of constitutional or statutory restraint, the right to remove the appointee."

I find no constitutional or statutory restraint which would prevent the county board of education from removing the trustees appointed under Section 100, supra, at any time.

In answer to your third inquiry, there is no time specified by law for holding an election for the nomination of school trustees. Under the provisions of Section 100, supra, it is the duty of the county board of education to appoint three trustees for every school in the county from six qualified persons nominated by the patrons of the school. Until such nominations have been made by the patrons of the school, the county board of education cannot make the appointment of trustees. Since it is the duty of the patrons of the school to nominate the persons to be appointed as trustees, it is my conclusion that the time for holding the election (nomination) of school trustees is a matter to be determined by the patrons of the school and not by the county board of education.

In view of the conclusions reached in answering your second and third inquiries, a consideration of your first inquiry as to whether or not a local school trustee appointed by the county board of education is regarded as an officer is not necessary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 15, 1950.

Hon. Broughton Lamberth,
Commissioner,
Department of Public Welfare,
CAPITOL.

Public Welfare, Department of.

State and County Departments of Public Welfare may engage in a program for Aid to the Permanently and Totally Disabled, and may receive federal funds made available for such a program; the program may not be financed entirely by the use of state and federal funds; the State Board of Public Welfare has

the authority to fix the proportion of local participation county by county in the total expenditure for such a program.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of August 29, 1950, is as follows:

"You are familiar with the fact that for a number of years the public assistance program in Alabama has included a category of Aid to the Handicapped. Previously, there has been no Federal participation in this program, however, the social security amendments of 1950 provide for Federal participation in Aid to the Permanently and Totally Disabled. It is highly important that the departments of public welfare in Alabama be able to take full advantage of such Federal legislation immediately. We, therefore, wish your official opinion on certain questions concerning the allowability and method of administration of a program for Aid to the Permanently and Totally Disabled.

"1. Is there legal authority for the State and county departments to engage in such a program and to receive Federal funds made available for such a program?

"2. May such a program be financed entirely by the use of State and Federal funds?

"3. If the answer to Question 2 is negative, does the State Board of Public Welfare have the authority to fix the proportion of local participation county by county in the total expenditures for such a program?

"The Social Security Adminstration has advised us that one of the conditions of receipt of Federal funds for Aid to the Permanently and Totally Disabled will be distribution of funds to provide equitable treatment of needy people in similar circumstances.

"I desire your opinion as soon as possible since I must attend a State Administrations' meeting in Washington early in September to discuss Alabama's plan for conforming to the Federal requirement of similar treatment of persons in like circumstances throughout the State."

I.

There is ample authority allowing the State and County Departments to engage in a program for Aid to the Permanently and Totally Disabled.

Title 44, Sections 1 and 18, Code, give the county governing bodies authority to engage in necessary and proper relief and support of the poor of the county concerned, and to make provisions for the care of the

poor and the needy, with the approval of the State Department of Public Welfare. In addition, Title 49, Section 8(7), Code, permits the State Department of Public Welfare to designate county departments as its agents under its rules and regulations to perform any of the State Department's functions.

The State Department of Public Welfare has the duty of administering and supervising all forms of public assistance, (Title 49, Section 8(1), Code). Further, the State Department is to act as the agent of the Federal Government in welfare matters of mutual concern, and in the administration of any Federal funds granted to the State, to aid in the furtherance of any of the functions of the State Department. The State Department is empowered to meet any Federal standards which may be established for the administration of such funds. (Title 49, Section 8(6), Code). Thus, there is ample authority for aid to the Permanently and Totally Disabled as a State program, since such aid is clearly for the relief and support of the poor, is clearly a program with a public welfare purpose, and is clearly a form of public assistance.

II.

The program may not be financed entirely by the use of State and Federal funds. Title 49 contemplates county participation in the financing of welfare programs of whatever category. This is clear from Section 5 of Title 49 which gives the State Board authority to make grants-in-aid to county departments for public welfare purposes and to require, as a condition for receiving such grants-in-aid, that the county department bear a fixed proportion of the total expenditures for which the grant is made available.

III.

The State Board of Public Welfare has the authority to fix the proportion of local participation county by county in the total expenditures for such a program. Title 49, Section 5, supra, sets out that the proportions of county participation in the total expenditures for which grants-in-aid are made available to county departments shall be determined by the Board. Funds available to the State Department and the resources and needs of the local governments shall be determined by the Board. Funds available to the State Department and the resources and needs of the local governments shall be criteria for determining such proportion, and the method of determining resources and needs of the several local governments must be uniform throughout the State.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 15, 1950

Hon. Broughton Lamberth
Commissioner
Department of Public Welfare
State of Alabama
CAPITOL

Public Welfare, Department of.

"Funds appropriated" as used in Title 49, Sec. 59, Code, as amended, (Gen. Acts 1943, p. 3) does not include federal funds made available to the State Department of Public Welfare for aid to dependent children purposes; the phrase does include the funds appropriated by the Legislature of Alabama to the State Department of Public Welfare for public welfare purposes, designated "For the Department of Public Welfare."

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of August 24, 1950 is as follows:

"I desire an official opinion concerning the proper construction of Title 49, Section 59, Code of Alabama 1940, as amended, General Acts 1943, page 3, approved May 13, 1943. Such construction is necessary for the proper administration of this law by the State Department of Public Welfare.

"More specifically, I desire a construction concerning the following matters:

"1. Whether 'funds appropriated' includes Federal funds made available to the State Department of Public Welfare for aid to dependent children purposes as well as funds appropriated by the Legislature of Alabama to the State and county departments of public welfare for welfare purposes.

"2. If the first question is answered negatively, does the phrase 'funds appropriated' include all funds appropriated by the Legislature of Alabama to the State Department of Public Welfare for public welfare purposes?

"3. If the answers to questions 1 and 2 are negative, then what is the proper meaning of 'funds appropriated to it for this purpose?'

"I desire an official opinion as soon as possible as such information is needed in our budget planning for the next fiscal year."

I.

Your first question must be answered negatively. Strictly speaking, federal funds are not "appropriated' 'to the State Department of Public Welfare. Since these funds are not "appropriated," they cannot constitute a part of the funds which are the subject of the proviso in Title 49, Section 59, as amended, General Acts 1943, page 3.

The provisions of 42 U. S. C. A. 301, make it clear that no money is appropriated directly to the states. The appropriations are to be administered by the Federal Security Administrator and "shall be used for making **payments** to states which have submitted and had approved by the (Federal Security Administrator) . . . State plans for old age assistance." See also 42 U. S. C. A. 601 (aid to dependent children) and 42 U. S. C. A. 1201 (aid to the blind).

Under the necessary interpretation of "appropriated," which is a word of art, it cannot be argued that federal funds are actually "appropriated" to the State Department of Public Welfare And, of course, a State Legislature cannot appropriate money from the Federal treasury. See **Chez ex rel. Weber College v. Utah State Bldg. Comm.**, 93 Utah 538, 74 P. 2d 687.

II.

Because of a similar strict interpretation of the word "appropriated," the answer to your question 2 is that the appropriation made "for the Department of Public Welfare" in the 1949 Appropriation Act (General Acts 1949, page 790) constitutes the "funds appropriated" to which a fraction of one-fifth is to be applied under the proviso in Title 49, Section 59, as amended, supra.

The Legislature in Section 59, supra, has used the word "appropriated." It is fundamental that the full and exclusive power to determine the amount of appropriations necessary for the performance of the essential functions of government has been vested in the Legislature. See **Abramson v. Hard**, 229 Ala. 2, 155 So. 590. The only "appropriation" of funds to the State Department of Public Welfare for any "purpose" which includes aid to dependent children is the abovementioned appropriation "for the Department of Public Welfare." (General Acts 1949, page 790). Thus, this total amount has been "appropriated" to the State Department of Public Welfare for a "purpose" which includes the "purpose" of aid to dependent children.

Aid to dependent children grants themselves are termed "payment" in Section 59, supra. "Made available" is used in Section 59, supra, as well as in Title 49, Section 54, which gives the State Department the administration of all of "all funds appropriated or made available." Title 49, Section 5, gives the State Board the authority to "make grants-in-aid" to the county departments of public welfare for public welfare purposes. Section 6 of Title 49 requires the Commissioner to submit to the State Board for appropval an annual budget of "all funds appropriated by the Legislature to the State Department for the specific purposes for which

they are appropriated . . . " The only funds "appropriated" by the Legislature for "purposes which include aid to dependent children are the abovementioned funds in the Appropriation Act of 1949, and the specfic purpose is for the State Department of Public Welfare.

Lump sum appropriations for aid to dependent children, old age assistance, and aid to the blind, without a specific designation of how much of the appropriaton shall be used in each category, have been sustained against constitutional attack in **Meredith v. Ray**, 292 Ky. 326, 166 S. W. 2d 437.

Furthermore in Section 59, supra, itself, State funds are spoken of "as contributed and made available" for the payment of aid to dependent children grants.

For the reasons set out in Section II of this opinion "funds appropriated" includes that item in the Appropriation Act of 1949 for the Department of Public Welfare ($2,160,000).

Since your Question 2 has been answered in the above manner, it is unnecessary to answer your Question 3.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 18, 1950

Hon. Bert E. Thomas
Tax Assessor
Moble County
Mobile, Alabama

Department of Revenue—Public Utilities.

Dealers of propane and butane gas are not within the purview of Title 51, Section 142, Code of Alabama 1940, and their property should not be assessed for taxation by the Department of Revenue.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of July 31, 1950, is as follows:

"I should appreciate your official opinion as to whether companies engaged in the selling of propane and butane gas in the several counties of Alabama shall be assessed for ad valorem taxation by the Department of Revenue as a public utility under Title 51,

Chapter 11, Paragraphs 142 through 188, or whether they shall be assessed by the several county assessors, and in addition pay the sales tax.

"Your attention is invited to an opinion dated September 14, 1948, and addressed to the Hon. M. M. Moulthrop, Mayor of the city of Eufaula, in which you held that as regards municipal licenses, a liquefied petroleum distributor, operating without a public franchise was not a public utility."

In answer to your request, it is my opinion that the several dealers over the State of propane and butane gas are not within the purview of Title 51, Section 142, Code of Alabama 1940, and the property of such dealers should not be assessed for taxation by the Department of Revenue.

I have reached this conclusion for several reasons, the first being that, in my opinion, the Legislature in imposing the duty upon the Department of Revenue to assess for taxation the property of those persons, firms and corporations enumerated in Title 51, Section 142, Code of Alabama 1940, intended to include only those public utilities that were under the jurisdiction and subject to the regulation of the Public Service Commission.

In my judgment, Section 142, supra, wherein it states it shall be the duty of the Department of Revenue to assess for taxation all property of "all person or persons, firms or corporations doing a gas business, transporting gas, or furnishing gas, natural, manufactured or by-product," refers to the same utilities set out in Title 48, Section 302, Subhead (4), which said utilities are under the supervision and control of the Public Service Commission.

Section 302 (4) places under the supervision and regulation of the Public Service Commission "Any plant, property, or facility for the manufacture, storage, distribution, sale or furnishing to or for the public of natural or manufactured gas for light, heat or power or other uses." It is to be noted that the Legislature used practically the same language in defining gas companies under the supervision of the Public Service Commission as it used in defining those companies under the provisions of Title 51, Section 142, supra.

This office, in an opinion addressed to Honorable Gordon Persons, Associate Commissioner of Alabama Public Service Commission, under date of June 10, 1943, Quartrely Report of Attorney General, Volume 31, page 79, ruled that dealers and distributors of propane and butane gas were not within the purview of Title 48, Section 302 (4), and were, therefore, not under the supervison or control of the public Service Commission.

Without question, the Legislature in enacting Section 142, supra, was dealing with public utilities and, in my opinion, was dealing with those

public utlities under the supervsion and control of the Public Service Commission. Therefore, since propane and butane dealers are not subject to the regulation or control of the Public Service Commission, it is my opinion that they do not come within the purview of Title 51, Section 142, supra, and their property should not be assessed for taxation by the Department of Revenue. On the other hand, the property of propane and butane dealers should be assessed for taxation by the various tax asssessors over the State.

To strengthen the above conclusion, propane and butane dealers are not actually dealers of "gas" as that word is used in Section 142, supra. These persons are dealing in "liquefied petroleum." As a matter of fact, "liquefied petroleum" does not become a gas until it passes through a special appliance on a stove or other appliance designed to use liquefied petroleum. The product which the propane and butane dealers place in an individual's tank or container is not a gas and does not become a gas until it leaves the individual's tank and passes through the special stove or appliance designed to convert liquefied petroleum into a gas.

You should, therefore, proceed to assess for taxation the property of those dealers of propane and butane gas located in your county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 18, 1950

Dr. D. G. Gill
State Health Officer
Department of Public Health
CAPITOL

Interstate Commerce—Municipalities—Health and Health Department.

1. The Health Department of the City and County of Montgomery is not in violation of the regulations of the Interstate Commerce Commission in taking meat under supervision pursuant to the authority vested in it by the Meat Ordinance of the City of Montgomery.

2. The procedures and instructions of the Health Department of the City and County of Montgomery with respect to transportation of meat within the City of Montgomery are in accordance with the provisions of Section 9 of the Meat Ordinance of that city.

3. The subject regulations of the Health Department represent a reasonable exercise of discretion permitted to the authorities in regulating matters of this type.

Opinion by Assistant Attorney General Halsey.

Dear Sir:

Your request for an official opinion, bearing date of April 13, 1950, is as follows:

"Your opinion in the following matter is respectfully sought.

"Mr. Roye Lowery of the Alabama Warehouse and Storage Company, Montgomery, is under contract with Kinghan Packing Company and Rath Packng Company to transfer meat and meat products from route cars on the railroad to consignees. Both Packing Companies are out-of-state and ship federally inspected meat, in refrigerated railroad cars, as the result of orders secured, and transmitted, by their local salesmen

"Section 9 of the Meat Ordinance of the City of Montgomery, adopted May 28, 1946 and published May 30, 1946 reads as follows:

" 'All vehicles used for the transportation of meats within the City of Montgomery or its police jurisdiction shall be so constructed and operated as to protect their contents from contamination. All vehicles used for the transportation of fresh meats shall be covered and insulated in a manner approved by the inspector so as to keep the meat cold. All vehicles shall be kept clean, and no substance capable of contaminating meat shall be transported with meat in such manner as to permit contamination.

" 'Persons engaged in the delivery of meats, as well as those engaged in unloading meat from railroad cars, or in loading or unloading trucks shall be clean of person, and shall wear clean washable uniforms, coats or aprons.'

"The Health Department of the City and County of Montgomery has based its procedures and instructions on the assumption that while the meat is federally inspected and shipped according to regulations of the Interstate Commerce Commission that when the route car is placed on a siding in the City of Montgomery, or its police jurisduction, and the seal on the car broken that the meat and meat products contents come under the jurisdiction of the local health authorities. Consequently, orders have been issued that all trucks transporting meat in Montgomery must be enclosed and insulated and temperature of meat not to exceed 45 degrees and truck temperature not to exceed 60 degrees. Requirements for personnel engaged in meat handling conform to provisions of the above Ordinance, Section 9.

"The questions which are presented are: (1) Is the Health Department of the City and County of Montgomery in violation of regulations of the Interstate Commerce Commission by taking the meat under suprevision before it is delivered to the premises of the consignee; and (2) Are its procedures and instructions in accordance with the provisions of Section 9 of the Meat Ordinance of the City of Montgomery?"

It is my opinion that your first question should be answered in the negative. It has been ascertained through correspondence with the Bureau of Motor Carriers in the Interstate Commerce Commission and careful scrutiny of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A., Sections 301-392, the Meat Inspection Act, 21 U. S. C. A., Sections 71-94, and the pertinent sections of the Code of Federal Regulations, that the Commission has issued no regulations covering the subject matter within the purview of Section 9 of the Meat Ordinance of the City of Montgomery.

It should be noted that this opinion does not presume to interpret the effect that the "commerce clause" of the Federal Constitution, Article I, Section 8, would work upon the aforementioned Meat Ordinance.

With reference to your second question, I refer you to the case of **Gilchrist Drug Company v. City of Birmingham**, 234 Ala. 204, 174 So. 609, which quotes with approval from **Spear v. Ward**, 199 Ala. 105, 74 So. 27:

> " 'It must be made to appear to the courts that this police power has been manifestly transcended or abused, before courts will set aside or declare void ordinances which are intended to promote the public health. The special provisions and the extent of such oridinances are matters usually, and almost of necessity, left in a large measure to the discretion and judgment of the municipal authorities. They have, of course, no absolute power to pass any arbitrary ordinance which their caprice or whim might desire; but the law does of necessity vest in them judicial discretion to be exercised reasonably, with regard to the circumstances of each particular case, the objects to be accompanied, and the existing necessity of the occasion.' "

The above rule will serve to illustrate the extent of the discretion permitted to the authorities in regulating matters of this type. If the particular regulation, in its operation, seems to be unduly arbitrary or oppressive, resort must be had to the courts to determine the reasonableness of the said regulation.

The answer to your second question, therefore, is in the affirmative, i. e., the procedures and instructions of the Health Department of the City and County of Montgomery are in accordance with the provisions of Section 9 of the Meat Ordinance of the City of Montgomery.

Yours very truly,

A. A. CARMICHAEL,

Attorney General

September 18, 1950

Miss Sibyl Pool
Secretary of State
CAPITOL

Constitutional Amendments—Ballots.

Under the provision of Section 285 of the Constitution of Alabama 1901, it is only necessary that the substance or subject matter of each proposed amendment be printed on the ballot used in constitutional amendment elections.

Opnion by Assistant Attorney General McQueen.

Dear Madam:

Your request for an offcial opinion, bearing date of August 29, 1950, is as follows:

"Please advise me if under the provisions of Section 285 of the Constitution of 1901, I, as Secretary of State, may certify to the several probate judges over the State a condensed form of the constitutional amendments to be voted on in the forthcoming November election.

"What I specifically want to know is whether or not I am authorized to certify to the Probate Judges only the nature and substance of the constitutional amendments and advise the probate judges that the condensed form may be placed on the ballots rather than set out the amendments in their entirety.

"In view of the fact that it is necessary to get my certificates to the probate judges within the next few days, I will appreciate an early reply."

My answer to your inquiry is in the affirmative.

Section 285 of the Constitution of Alabama 1901, reads, in pertinent part, as follows:

"Upon the ballots used at all elections provided for in section 284 of this constitution, the substance or subject matter of each proposed amendment shall be so printed that the nature thereof shall be clearly indicated."

The Supreme Court, in the case of **Jones et al v. McDade,** 200 Ala. 230, 75 So. 988, had occasion to consider the precise question presented by your inquiry.

In that case, the Supreme Court was considering the sufficiency of a ballot used in an electon on a proposed amendment to the Constitution.

This proposed amendment had to do with the compensation of public officials of Montgomery County.

The proposed amendment was set out on the ballot as follows:

"Proposed Amendment No. 2

"Shall the Constituton of Alabama be amended so that the judge of probate, sheriff, tax assessor and tax collector of Montgomery County will be placed on salary and required to cover the fees collected by them into the treasury of Montgomery County?

"( ) Yes.

"( ) No."

As provided by the act proposing the amendment, the printed ballot omitted reference to two features of the proposed amendment, viz: (a) That hereafter the Legislature may from time to time fix, regulate, and alter the amount of the named salaries and allowances; and (b) that the Legislature may from time to time fix, regulate, and alter the amount of compensation received by all other county officers of Montgomery County. The court held that the substance or subject matter of the proposed amendment printed on the ballot was sufficient to clearly indicate the nature of the proposed amendment, the court saying:

"The nature of this proposed amendment was to effect the change of the mode of compensating county officers in Montgomery County. Its nature was 'clearly indicated' by the printed matter on the ballot; but its entire 'substance or subject matter' was not set forth in the matter printed on the ballot. The matter printed on the ballot plainly indicated the proposed amendments' kind, species, character, sort, the qualities and attributes which distinguished it. If the printed matter on the ballot had included the two features not specfically enumerated thereon, an abstract or compendium of the proposal would have been set forth on the ballot. This is not required. That which was printed on the ballot nominated and described, by means of a partial recital of important features of the substance or subject matter of the proposal, the subject for the voter's expression of his desire."

After the decision in the Jones Case, supra, was handed down, the Supreme Court again considered the question presented by you in the

case of **State, ex rel. Garrow, et al. v. Grayson,** 220 Ala. 12, 123 So. 573. Following the principles established by **Jones v. McDade,** supra, the Court, in the **Grayson Case,** said:

> "That case holds: (1) That whether a ballot on a proposed constitutional amendment is valid is determined by compliance with section 285, of the Constitution, and not with the direction of the act proposing the amendment: (2) that if the matter printed on the ballot clearly indicated the nature of the amendment in respect to its substance or subject matter, such ballot was a compliance with the requirements of section 285 of the Constitution: (3) that it was not the office of the ballot to inform the elector of the full purport of the amendment, but to give the elector an opportunity to express his will for or against the adoption of the amendment; (4) that the office of the proclamation of the Governor carrying a full draft of the amendment, published in each county of the State for eight consecutive weeks previous to the election, is to advise the electorat of its full purport and effect, and it must be assumed that they are fully advised as to the full purport of the amendment."

It, therefore, conclusively follows from the holding in the **McDade Case** and the **Grayson Case** that only the substance or subject matter of a proposed amendment is required by Section 285, supra, to appear on the ballots used in constitutional election amendments, and it is not necessary that the entire act proposing the constitutional amendment be placed on the ballot.

For your convenience and official guidance, I am enclosing herewith condensed forms of the six constitutional amendments to be voted on in the forthcoming election in November, and these condensed forms may be placed upon the ballots used in said election.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 25, 1950

Hon. L. A. Whetstone
Tax Assessor
Jefferson County
106 Court House
Birmingham, Alabama

Ad Valorem Taxes—Exemptions—Taxation.

Eagles Lodge is not exempt from ad valorem taxation.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an offcial opinion, bearing date of April 11, 1950, is as follows:

"Please give me your official opinion as to whether a lot and building owned by trustees for Pratt City Aerie No. 972, Fraternal Order of Eagles, in Jefferson County, Alabama, is exempt from ad valorem taxation under Secton 2, Title 51, Alabama Code of 1940, or any other exemption.

"The lot is occupied exclusively by the building and the building is used by Pratt City Aerie No. 972, F. O. E., exclusively for purposes purely charitable. No part of the building is leased to or used by any other tenants or organizations. The charitable enterprises to which this Aerie regularly contributes include the Alabama Sight Conservative Fund, the Cripple Children's Clinic, the the Bay View Teen-Age Club (for character building among teen-age boys and girls) the Pratt City Y. M. C. A., the Milk Fund for Children in the Pratt City Schools, to name a few.

"Each Christmas this Aerie spends from $4,000 to $6,000 in sending out baskets of groceries and other necessaries to needy families and under-privileged children, in addition to sending a box of candy and $5 to the widows of deceased members. Each year the Aerie gives a party to the indigent old people at the Keetona Old Folks Home. It has organized a boys' soft ball club in order to teach sportsmanship and build character in the youth of Pratt City and the other parts of Birmingham. The Aerie carries on a program of visiting the sick and it pays benefits to sick members.

"During the recent mine strike, the Pratt City Aerie raised funds and collected groceries, food and medicine, which its members distributed among needy families of the unemployed miners.

"Whatever meetings are held are for the purpose of organizing and reporting on its charitable enterprises and to keep membership interest stimulated. Its social activiites are held to foster member

interest and to raise money for the promoton of its charitable endeavors; and all of its social activities tend to promote the charitable purposes for which it exists."

The lot and building owned by the trustees of the Pratt City Aerie No. 972, Fraternal Order of Eagles, is not exempt from ad valorem taxation on the assumption that there is no charter pursuant to legislative act which contains such a tax exemption.

The exempton allowed by Title 51, Secton 2, Code of Alabama 1940, is for real and personal property which is "used **exclusively** for religious worship, for schools or **for purposes purely charitable.**" (Emphasis supplied.)

The statement in your request that the building is used exclusively for purposes purely charitable begs the question posed, i. e., whether or not the lot and building are actualy used for purposes **purely** charitable. The answer to this question involves a determination of the legal effect of the facts which you have outlined. I refer you to Quarterly report of the Attorney General, Volume 57, page 54, and to **B. P. O. E. Lodge No. 511 v. City of Houston, Tex.** Civ. App., 44 S. W. 2d 488, and to the cases annotated in 22 A. L. R. 907, 916; 83 A. L. R. 773, 780.

In your request and in your supplementary letter, you refer to social activities which are engaged in by members of the Order in the Order's building. Also, in your letter, you enumerate these activities as being dances, parties, entertainments and county fairs. "A buildng used as the headquarters of a lodge or fraternal order of a charitable character is not exempt if one of the dominant uses of the building is for the social enjoyment of the membership, since such a building, in its legal aspect, is no different from the clubhouse of an ordinary social club." 26 R. C. L. 319.

The Texas Case, supra, noted that the Elks Lodge was a fraternal organization, with a secret ritual and that its favors and pleasures were confined to its membership, so much so that outsiders might not share them except by invitation from members. The case also noted that any recreational facilities were maintained for the pleasure and convenience of the members and that the organization was utilized as a means of social contact. The court there questioned whether the order would carry on if these social features were absent. The considerations which were involved in that case are controlling here. I quote from that court's opinion: "The many admirable acts of charity done by the organization are to be commended, but do they constitute the only, or the whole, purpose of the institution? Is not the charity feature but an incident to the whole?" 44 S. W. 2d at 493.

To reiterate, the lot and building owned by the trustees of the Pratt City Aerie, No. 972, Fraternal Order of the Eagles, are not exempt from ad valorem taxation.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 25, 1950

Hon. J .F. Laseter
Judge of Probate
Barbour County
Clayton, Alabama

Veterans—Licenses—Exemptions.

Veterans eligible for exemption from payment of business or occupational license taxes, as provided by Act. No. 353, General Acts 1945, page 570, as amended by Act No. 698, General Acts 1947, page 535, if exempt on October first of the year for which such license tax is due, are exempt for the entire tax year.

Opinion by Assistant Attorney General Johnson.

Dear Sir:

Your request for an official opinion, bearing date of September 14, 1950, is as follows:

"Will you please issue an opinion on the following important matter. Veterans who have been receiving exemptions on privilege license will soon begin coming in the Probate Office to secure their new 1950-51 privilege license. Some of them that were entitled to six (6)) years exemptions have receive their exemption for 5½ years. I want to know if I can issue a full year license and collect for one-half year and exempt a veteran for the other one-half year. Some seem to think that we should tell the veteran he is not entitled to the one-half year exemption, due to the fact that we cannot issue license for one-half year until after the first day of next April. Some veterans exemption will run out next July, then what shall we do about collecting from said veteran for July, August and September? Therefore, you see that we are going to run into some very hard complications on selling 1950-51 privilege licenses. I just thought probably some other Probate Judge had been smart enough to ask for an opinion way before this date, but Sam Grubbs, who is with the Department of Examiners of Accounts, tells me that this has not been done by anyone.

"Possibly, if this letter is not clear, you could get Sam Grubbs to explain more fully to you just what I want and what the other sixty-six other Probate Judges in the State **should** want.

"I will greatly appreciate you giving this your prompt attention, especially since I had planned to start on September 15th issuing licenses to veterans, hoping that the veterans will cooperate with me by coming in before October 1st to secure their licenses as it is going to take some time to figure up whether each veteran has already gotten his full exemption or not."

The exemptions afforded veterans, to which you refer in your request for opinion, were originally provided for at the 1945 Session of the Alabama Legislature. See Act No. 353, General Acts 1945, page 570. This act, as originally adopted, provided that veterans qualified thereunder be exempt from business or occupational license taxes for a period of three years after the effective date of such act or for a period of three years after discharge from, or termination of service, whichever might be later, to the extent and subject to the conditions of such act. This act was approved by the Governor upon July 6, 1945, and its provisions became effective upon such date.

During the course of the 1947 Session of the Alabama Legislature, said body saw fit to alter the above mentioned provisions of Act No. 353, supra, with regard to the period of time during which such exemptions could be claimed by veterans eligible for same thereunder. Section 1, Act No. 698, General Acts 1947, page 535, is here quoted in full:

> "Section 1 of Act 353, approved July 6, 1945, which relates to exemption of veterans from business or occupational license taxes, is amended to read: 'Section 1. Every bona fide permanent resident of the State of Alabama who has served 90 days or more in the armed forces of the United States between September 16, 1940 and the termination of World War II by the signing of a definitive treaty of peace shall, upon sufficient identification, and upon sufficient proof of being a permanent resident of this State, and upon the production of an honorable discharge from or other proof of the honorable termination of such service, be exempt from business or occupational license taxes for a period of six years after the effective date of this Act or for a period of six years after his or her discharge from or termination of service, whichever is later, to the extent and subject to the conditions herein specified.' No exemption, however, shall be allowed any such person from the license tax on what commonly are known as rolling stores; nor shall the exemption herein granted be construed as relieving any person from the payment of any license tax for the registration or operation of any motor vehicle."

You will note that under the terms of this latter act, the time within which eligible veterans may claim the exemption therein granted has been extended, said act providing that such person shall be exempt from business or occupational license taxes for a period of six years after the effective date of this act or for a period of six years after his or her discharge from or termination of service, whichever is later, to the extent and subject to the conditions of such act.

Since the latter act, No. 698, supra, is merely amendatory in nature and the provisions thereof only serve to amend the terms of Act No. 353, supra, or for a period of six years from the date of his or her discharge from or termination of service, whichever is the later. See opinion to Hon. R. P. McRee, Administrator, Alabama Alcoholic Beverage Control Board, under date of August 23, 1950, (Ms.).

The date upon which the licenses referred to in your request for opinion become due and payable is October first of each year and shall be for one year ending September thirtieth following. Title 51, Section 851, Code of Alabama 1940.

It is my opinion that if an eligible veteran is exempt from payment of business or occupational license taxes as provided by Act No. 353, as amended by Act No. 698, supra, on the due date, October first, of any year, that such exemption extends throughout the tax year, i. e., ending September thirtieth following. In other words, if the six year period of any eligible veteran has not expired before October first, 1950,, the date that such license taxes become due, then such veteran is entitled to exemption for the year beginning October first, 1950, and ending September thirtieth, 1951.

This conclusion finds support in the case of **Johnson, Tax Assessor v. State ex rel. City of Birmingham**, 245 Ala. 499, 17 So. 2d. 662, in which it was held:

> "It is a well recognized rule in all procedures adopted for the annual assessment of property taxes, that there shall be one fixed date—a law day—with respect to which persons and subjects of taxation shall be determined and values fixed or assessed. International Paper Co. v. Curry, 243 Ala. 228, 9 So. 2d. 8, 12. In the last cited case the court said: 'Liability for franchise tax is as of a fixed date and there is no authority for the tax department to assess a tax based on liability, other than of the law date of liability.' "

See also the case of **United States v. Alabama**, 313 U. S. 274, 85 L. Ed. 1327.

While the cases cited are concerned with ad valorem taxes, they are closely analogous to the problem presented by your request for opinion, and the rule laid down in these cases apply also to business or occupational license taxes.

You are, therefore, advised that if a veteran is eligible for exemption from payment of business or occupational license taxes as provided by Act No. 353, as amended by Act No. 698, supra, on the law day, October 1, 1950, that such exemption extends throughout the tax year ending September 30, 1951.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 25, 1950

Hon. M. G. Hale, Chairman
Board of Revenue
Colbert County
Tuscumbia, Alabama

Counties—Colbert County—Officers and Offices—Roads and Bridges.

The Board of Revenue of Colbert County has the legal right to purchase land, in which one of its members owns a one-half interest, in order to obtain gravel to be used in the construction and repair of county roads, provided such member takes no part in the actions of the board (i. e., does not sit as a member of the board) concerning the purchase of the same.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of August 14, 1950, is as follows:

"The Board of Revenue of Colbert County is considering purchasing for the County a tract of land which would be useful to the County as a gravel pit, since it appears to have an abundance of chirt or gravel which could be used in road construction and repairs. The tract of land is owned by two parties, one of whom is a member of our Colbert County Board of Revenue, who owns a one-half undivided interest in the land.

"The question has arisen as to whether under the law the County Board of Revenue has the legal right to purchase this land from one of its own members, and whether there is any law prohibiting the said member of the County Board of Revenue from selling the land to the County.

"Please kindly give us a ruling upon this question as early as you can conveniently do so."

In answering your inquiry, it is necessary to consider Title 41, Section 211, Code of Alabama 1940, which provides in part as follows:

"Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dol-

lars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; . . . "

The above statute is a penal statute and must be strictly construed, and may not be extended by construction. Quarterly Report of Attorney General, Vol. 16, page 208; Vol. 17, page 48; Vol. 23, page 5.

Placing a strict construction on this statute, we find that a member of the court of county commissioners or board of revenue is prohibited from taking any contract with the county for work or services, or from selling any goods or supplies to the county.

Your inquiry involves the purchase of real estate by the county from a member of its board of revenue. The terms "any contract, for work or services of the county" and "goods or supplies," used in the statute, cannot be extended to include real estate. It is, therefore, my conclusion that Section 211, supra, does not prohibit the sale of real estate to the county by a member of the Board of Revenue of Colbert County. Cf. Quarterly Report of Attorney General, Vol. 16, page 208, supra; Vol. 17, page 48, supra.

The only other statute that need be considered in answering your inquiry is Title 41, Section 221, Code of Alabama 1940, which provides in part as follows:

"Every public officer who shall:

* * * * *

"2. Be beneficially interested, directly or indirectly, in any contract, sale, lease, or purchase which may be made by through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratutity or reward from any other person beneficially interested therein;

* * * * *

"Shall be fined not more than one thousand dollars and may be sentenced to hard labor for the county for not more than six months, and any contract, lease, sale or purchase mentioned in subdivision 2 hereof shall be void."

The above statute is also a penal statute and must be strictly construed. Authorities, supra.

Under the provisions of Section 221, supra, a member of the governing body of a county cannot be interested, directly or indirectly, in any contract, sale, lease, or purchase made by him, or through, or under his supervision in whole or in part.

The question then arises as to whether or not the purchase by the county of the one-half interest in the real estate owned by a member of the Board of Revenue of Colbert County is made by, through, or under the supervision of such mmeber of the board, directly or indirectly. It is my conclusion that it is not.

There is no question as to the authority of the county to purchase real estate in order to obtain gravel to be used in the construction and repair of public roads. Such authority is expressly given by Title 12, Section 198, Code of Alabama 1940.

Under the provisions of Title 23, Section 43, Code of Alabama 1940, courts of county commissioners, boards of revenue, or other like governing bodies of the several counties are given general superintendence of the public roads, bridges, and ferries within their respective counties. Such county governing bodies "are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state." See **Court of Commissionrs of Pike County v. Johnson,** 229 Ala. 417, 157 So. 481; Biennial Report of Attorney General, 1936-38, page 799.

The Board of Revenue of Colbert County was created by Act No. 131,, General and Local Acts 1949, page 157. This Act does not limit the jurisdiction and power of the Board of Revenue of Colbert County. Section 10 of the Act provides as follows:

> "That all the general laws heretofore and hereafter enacted by the Legislature of Alabama, in relation to the jurisdiction powers, authorities or duties of Boards of Revenue or Commissioners courts in this State shall apply to said Board of Revenue of Colbert County, except so much of the general laws as may relate to the mode of selection of said Board of Revenue, provided that this Act shall not be construed to impair the jurisdiction and authority of the said Board."

If the property under consideration is purchased by the county, such purchase would be made by the Board of Revenue of Colbert County and not by the individual member of the board owning a one-half interest therein.

The prohibition contained in Section 221, supra, is directed at the officer and not at the governing body of a county, or other administrative body. Cf. **Garrison v. Sumners,** 223 Ala. 17, 134 So. 675; Quarterly Report of Attorney General, Vol. 23, page 5. If the member of the Board of Revenue of Colbert County owning one-half interest in the property takes no part in the actions of the board (i. e., does not sit as a member of the board) concerning the purchase of the same, he would not be guilty of misconduct in office. Cf. Biennial Report of Attorney General, 1934-36, page 165; Quarterly Report of Attorney Genreal, Vol. 30, page 16.

In view of the above conclusions, it is my opinion that the Board of Revenue of Colbert County has a legal right to purchase land, in which

one of its members owns a one-half interest, in order to obtain gravel to be used in the construction and repair of county roads, provided such member takes no part in the actions of the board (i. e., does not sit as a member of the board concerning the purchase of the same.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 26, 1950

Hon. Broughton Lamberth, Commissioner
Department of Public Welfare
421 South Union Street
Montgomery 5, Alabama

Department of Public Welfare—Checks.

The State Department of Public Welfare may legally mail checks to recipients of public assistance in the several counties of the State, rather than to the various county departments of public welfare for distribution to such recipients .

Opinion by Assistant Attorney General Cameron.

Dear Sir:

Your request for an official opinion, bearing date of Septmeber 6, 1950, is as follows:

"I am writing to request an official opinion of your office on the question of legality of the following proposed change in the procedure for mailing checks to public welfare recipients.

"On November 25, 1949, we requested such an opinion but several things entered into the matter including slight opposition from a few county officials. We now hope to be able to work out this situation to the satisfaction of all concerned.

"Under our present system the checks are made up in the State Department of Public Welfare through I. B. M. service. All funds which go into the payment of checks to public welfare recipients are deposited in banks in the various counties of the State to the credit of the county department concerned. Included in these county bank accounts are state and federal funds which have been made available to the respective counties. The county submits to the State Department of Public Welfare a list of those persons authorized to receive public welfare payments for the month involved. The State Department, as indicated above, then makes out checks through its I. B. M. service payable to the persons whose names are on the lists of those persons authorized to receive payment. These chcks are drawn on

the banks in the counties wherein the money has been deposited. The signature plates of the drawers, so authorized by the county boards of welfare are in the possession of the State Department of Public Welfare and are imprinted upon the checks by the State Departmnt of Public Welfare.

"The checks are then mailed to the various county departments of public welfare throughout the State. The checks are then re-mailed to the respective public welfare recipients. The State Board of Public Welfare has directed me, as Commissioner of Public Welfare, to investigate the legality of mailing checks directly to the recipients of public assistance, and to eliminate the step of mailing first to the county departments.

"The purpose of this request is to inquire as to the legality under the public welfare statutes, or any other applicable statutes, of a centralized mailing procedure."

While the general supervision of the administration of the welfare program of the State is vested in the State Department of Public Welfare (Title 49, Section 8 (1), Code of Alabama 1940, the various county departments of public welfare have authority to accept and administer funds made available to them for welfare purposes, subject to the rules and regulations of the State Department.

The county departments, according to the facts set forth in your request, have given the State Department the authority to write checks payable to the recipients appearing on the lists which you mentioned, and drawn on banks in the various counties, in which banks the funds made available to the county deparmtents have been deposited. The final step of mailing these checks to the individual recipients throughout the State is a purely mechanical matter, which the State Department may legally undertake to perform. This final step is merely incidental to the process of making out the checks and signing them. I find nothing in the public welfare statutes, or in other applicable statutes, which would prohibit the centralized mailing procedure as outlined in your request.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

INDEX

Quarterly Report of Attorney General

Volume 60

July 1, 1950, Through September 30, 1950

—A—

Page

ACTS (GENERAL AND LOCAL):
LOCAL ACTS 1935:
Page 131 30

GENERAL ACTS 1943:
Page 3 147

LOCAL ACTS 1943:
Page 81 118

GENERAL ACTS 1945:
Page 473 35
Page 570, as amended 100, 162
Page 734, as amended 140

GENERAL ACTS 1947:
Page 62 62
Page 241 32
Page 338 109
Page 445 140
Page 509 78
Page 535 162

LOCAL ACTS 1947:
Page 137 126
Page 232 59
Page 303 44

GENERAL & LOCAL ACTS 1949:
Page 130 74
Page 347 17
Page 407 120
Page 469 8
Page 544 5
Page 557 11
Page 691 15
Page 819 5
Page 915 134
Page 1045 20

INDEX
(Continued)

Page

AD VALOREM TAXES:
Eagle Lodge—Not exempt from 160
Homestead exemptions—Death of life tenant or termination of widows' rights 83
Personal property—Sale for nonpayment—Notice and levy 26

ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD:
Legal expenses incurred by surety of members in defending suit—May not pay 115
Sale on Sunday—Not prohibited in private clubs 74
Under term of lease considered liable for cost of gas heater 89

APPEALS:
Transcript—Register may agree to preparation by attorneys—Must certify to correctness 63

APPROPRIATIONS:
Legislative clerks, assistants, etc.—Salaries—Continuing appropriations 11
Legislative—Amendment No. 57, provides continuing appropriation for salaries of legislators 11
Legislators—Traveling expenses 54

ATTORNEYS:
County may not employ to assist in collection of delinquent taxes on personal property 69

AUTAUGA COUNTY:
Court of Common Pleas—Clerk—Fees discussed generally 44

AUTOMOBILE DEALERS:
Oil companies selling tires, tubes, etc.—Must pay license levied by General Acts 1939, p. 966 50

—B—

BAIL:
Forfeiture of bond—Rearrest on alias warrant—Entitled to bail 110

BALLOTS:
Constitutional Amendment—Only necessary that substance or subject matter be printed on 157
Officer charged with printing—Candidate not qualified—May decline to print name on 126

BANKS AND BANKING:
Gasoline tax warrants—Trustee bank's fee for handling 51

BIDS:
Counties may contract for construction of courthouse without advertising for competitive bids 109

INDEX
(Continued)

Page

BOARD OF REGISTRARS:
Acts as a board—Action by individual member of no force 78
Jefferson County—Duties and authority 78
Precinct lines—Voting places—No authority in respect to 78

BONDS:
Forfeiture of bail—Rearrest on alias warrant—Entitled to bail 110
Legal expenses incurred by surety of members of ABC Board in defending suit—Board may not pay 115

—C—

CALHOUN COUNTY:
Deputy solicitor—Training school—No authority to pay expenses for attending 37

CANDIDATES:
Mayor, councilman or city commissioners—Must be qualified elector 126
Officer charged with printing ballot—Candidate not qualified—May decline to print name on 126

CEMETERIES:
Counties may not appropriate funds for maintenance or beautification 98

CENSUS:
Effective date of for reclassification 73
Effective date of 1950 census 55
School—No authority for county to pay cost for including children not within age group 34

CHEROKEE COUNTY:
Judge Law and Equity Court—Senate approval of appointment not necessary 118

CITY BOARDS OF EDUCATION:
Population of city falling below 2500—City board defunct—County board takes over 55

CLERKS OF INFERIOR COURTS:
Autauga County—Court of Common Pleas—Fees discussed generally 44

CODE OF ALABAMA 1940:

TITLE 7:
Section 744 63
Section 773 63

INDEX
(Continued)

Page

TITLE 8:
Section 47 25
Section 87 25
Section 111 28
Section 142 28

TITLE 10:
Sections 2, 4 143

TITLE 12:
Section 177 106
Section 186 35
Section 197 138

TITLE 14:
Section 275 22

TITLE 17:
Section 34 78
Section 56 78
Section 145 126
Section 171 126

TITLE 23:
Section 25, as amended 120

TITLE 28:
Section 323, as amended 20

TITLE 29:
Section 1 74

TITLE 32:
Section 13 54
Sections 18, 19, 20, 25, 26, as amended 11

TITLE 37:
Section 526 81

TITLE 41:
Section 211 165
Section 221 (2) 165

TITLE 45:
Sections 142, 143, 144, 146 59

TITLE 49:
Section 13 112
Section 30, as amended 112

INDEX
(Continued)

Page

TITLE 51:
Section 2 160
Section 142 152
Section 201 26
Section 219 69
Section 238 126
Section 618 40
Section 619 (e) (g) 124
Section 753 93
Section 755 (b) 93
Section 788 93
Section 789 (d) 93

TITLE 52:
Section 90, as amended 34
Section 100 145
Section 148 55
Sections 185-218, as amended 110
Section 235 136

TITLE 62:
Section 28 37

COMMISSIONS:
Tax assessor—Paid only on taxes actually collected 19

COMPENSATION:
Commissioners Court Wilcox County—Under Local Acts 1945, p. 110 104

CONDEMNATION:
Drainage districts—County authorized to condemn land for establishing 138
Proceeding by county to secure State highway right-of-way—Decree awarding damages runs against county 120
Right-of-way for State purposes — County advances damages assessed—Highway Department must reimburse 120
Right-of-way for State purposes—City advances damages assessed—Highway Department must reimburse 120
Right-of-way for State highway—Refusal of city to acquire—Highway Department must acquire — County may not advance cost 120

CONSERVATION, DEPARTMENT OF:
Fine for killing wild turkey out of season—Payable to 25
License for packing or processing seafood—Includes crabs 28

INDEX
(Continued)

Page

CONSTITUTION OF 1901:
Amendment 20 136
Amendment 57 11
Amendment 72 32
Section 65 22
Section 215 (a) 35
Section 285 157

CONSTITUTIONAL AMENDMENTS:
Amendment No. 57 provides continuing appropriation for salaries of legislators 11
Ballots—Only necessary that substance or subject matter be printed on 157

CONSTITUTIONALITY:
"Little Taft-Hartley Act," General and Local Acts 1949, p. 347—Unconstitutional 17

CONTRACTS:
Counties may contract for construction without advertising for competitive bids 109
Walker County—Not made as provided by Local Acts 1935, p. 131—Board of Revenue may not legally pay 30

CORPORATIONS:
Name "Liberty National Life Insurance Company" and "Liberty National Finance Company" too similar—Articles of incorporation should not be recorded 143

COSTS AND FEES:
Clerk—Court of Common Pleas—Autauga County—Fees discussed generally 44
Sheriff—Mileage under General Acts 1947, p. 62—May not be paid unless there is a conviction 62

COUNTIES:
Attorney—May not employ to assist in collection of delinquent taxes on personal property 69
Cemeteries—May not appropriate funds for maintenance or beautification 98
Coliseum for agricultural exhibits—Expenditure of special tax authorized by Constitution, Sec. 215(a) for construction of 35
Condemnation to secure State highway right-of-way—Decree awarding damages runs against 120
Courthouses—Contract for construction—May be let without advertising for competitive bids 109
Deputy solicitor—Training school—No authority to pay expenses for attending 37

INDEX
(Continued)

Page

Drainage districts—Authorized to condemn land for establishing....138
Employee killed in road work—Not liable for damages for.... 67
Feeding prisoners—Sheriff may be required to make reports to county in reference to.... 59
Filing tax—County in which mortgage filed not entitled to part of tax unless property or portion situated in county when instrument first filed....124
Gasoline tax warrants—Trustee bank's fee for handling.... 51
Gravel pit in which member of governing body owns one half interest—May purchase....165
Hospital tax levied under Amendment 72—Appropriation to city to extend sewer line to hospitals.... 32
Prisoners—Feeding—Amount in excess of sixty cents per capita per day—Must be paid by when sheriff on salary basis.... 59
Property not used—May lease....106
Right of way for State purposes—County advances damages assessed—State Highway Department must reimburse....120
Roads—Grade separation—May pay entire cost of construction and maintenance.... 47
Roads—Farm to market—Grade separation—State and county may share in cost of construction—County must maintain.... 47
School census—No authority to pay cost for including children not within age group.... 34
Walker—Contracts not made as provided by Local Acts 1935, p. 131—Board of Revenue may not legally pay.... 30
Wilcox—Commissioners—Compensation under Local Acts 1945, p. 110....104

COUNTY BOARDS OF EDUCATION:
Population of city falling below 2500—City board defunct—County board takes over.... 55
School trustees—Board may revoke appointments previously made....145
School trustees—No specified time for holding election of—Patrons to determine time....145

COURTHOUSES:
Counties may contract for construction of without advertising for competitive bids....109

—D—

DEPARTMENT OF REVENUE:
Propane and butane gas dealers—Property not assessable under Title 51, Section 142....152

DRAINAGE DISTRICTS:
County authorized to condemn land for establishing....138

INDEX
(Continued)

Page

—E—

ELECTIONS:
Constitutional Amendment—Only necessary that substance or subject matter be printed on 157
Candidate for mayor, councilman or city commission—Must be qualified elector 126
Jackson County—Gasoline tax—General & Local Acts 1949, p. 915, contemplates only one election 134
Lawrence County—School tax election under Constitution 1901, Amendment 20—May be held at any time 136
Officer charged with printing ballot—Candidate not qualified—May decline to print name on ballot 126
Precinct lines—Voting places—Board of Registrars has no authority in respect to 78

EMPLOYEES RETIREMENT SYSTEM:
Member who has attained or will attain age 70 on or before October 1, 1950—May be continued in service under certain conditions 140

EXEMPTIONS:
Department of Physical Education and Athletics of University of Alabama—Exempt from sales and use tax 93
Eagle Lodge—Not exempt from ad valorem taxes 160
Homestead—Death of life tenant or termination of widow's rights 83
Poll tax—Exemption on account of disability—Must be claimed annually 126
Veterans—Licenses under General Acts 1945, p. 570, as amended—If exempt on October 1, exempt for entire year 162
Veterans—Under General Acts 1945, p. 570, as amended—Probate judge determines value of property 100
Veterans—Under General Acts 1945, p. 570, as amended—Need not be resident of county—May claim in only one county 100
Veterans—Under General Acts 1945, p. 570, as amended—Computation of 6-year period 100
Veterans—Under General Acts 1945, p. 570, as amended—Determination of net income 100

—F—

FEDERAL SAVINGS AND LOAN ASSOCIATION:
Deed by corporation to association conveying property under lease sale contract—Subject to filing tax 40

FILING TAX:
County in which mortgage filed not entitled to part of tax unless property or portion situated in county when instrument first filed 124

INDEX
(Continued)

Page

Deed by corporation to Federal Savings & Loan Association conveying property under lease sale contract—Subject to 40
Financing plan—Incurring indebtedness but conveying no interest in property—Not subject to 14
Judge of probate not entitled to 5% when instrument previously filed in another county and tax is paid 124
Mortgage to national bank—Assigned to third party, not national bank—May be accepted for recording 91

FINANCE, DEPARTMENT OF:
State Insurance Fund—Surplus—May invest in Alabama Municipal bonds 20

FINANCIAL INSTITUTIONS:
City incorporated prior to September 1—Entitled to distribution of tax 71

FINES:
Killing wild turkey out of season—Payable to Department of Conservation 25

FUNDS:
State Insurance Fund—Surplus—May be invested in Alabama municipal bonds 20

—G—

GAMING AND LOTTERIES:
Scheme where name drawn by chance and award made for answering questions—Lottery 22

GAME AND FISH:
Fine for killing wild turkey out of season—Payable to Department of Conservation 25
License for packing or processing seafood—Includes crabs 28

GASOLINE:
Farm tractor refund—Claimant must have user's permit 8

—H—

HEALTH AND HEALTH DEPARTMENT:
Meat ordinance—City of Montgomery—Does not violate Interstate Commerce Commission 154

HIGHWAYS & HIGHWAY DEPARTMENT:
Condemnation by county to secure State highway right of way—Decree awarding damages runs against county 120

INDEX
(Continued)

Page

Farm to market road—Grade separation—State and county may share in cost of construction—County must maintain 47

Grade separation over railroad—State funds expended on construction or maintenance—Railroad company must pay one-half of cost 47

Right-of-way for State purposes—County advances damages assessed—Department must reimburse 120

Right-of-way for State purposes—City advances damages assessed—Department must reimburse 120

Right-of-way for State highway—Refusal of city to acquire—Department must acquire—County may not advance cost 120

HOMESTEAD:

Exemptions—Death of life tenant or termination of widow's rights 83

HOSPITALS:

Special county tax under Amendment 72—Appropriations to city to extend sewer line to county hospital 32

—I—

INFERIOR COURTS:

Autauga County—Court of Common Pleas—Clerk—Fees discussed generally 44

Law and Equity Court Cherokee County—Senate approval of appointment of judge not necessary 118

INTOXICATING LIQUORS:

Sale not prohibited in private clubs on Sunday 74

—J—

JACKSON COUNTY:

Gasoline tax—General and Local Acts 1949, p. 915, contemplates only one election 134

JEFFERSON COUNTY:

Board of Registrars—Duties and authority 78

JUDGES OF PROBATE:

Filing tax—Not entitled to 5% when instrument previously filed in another county and tax is paid 124

INDEX
(Continued)

Page

—L—

LABOR:
"Little Taft-Hartley Act," General and Local Acts 1949, p. 347—Unconstitutional 17

LAWRENCE COUNTY:
School tax election under Constitution 1901, Amendment 20—May be held at any time 136

LEASES:
County property not used—May be leased 106

LEGISLATURE:
Amendment No. 57 provides continuing appropriation for salaries of legislators 11
Clerks, assistants, etc.—Salaries—Continuing appropriation 11
Traveling expenses—Appropriation for 54

LICENSES:
Census—Effective dates of for reclassification 73
Oil companies, selling tires, tubes, etc.—Must pay license levied by General Acts 1939, p. 966 50
Packing or processing seafood—Includes crabs 28
Veterans—Exemption under General Acts 1945, p. 570, as amended—Computation of 6-year period 100
Veterans—Exemptions—Under General Acts 1945, p. 570, as amended—Need not be resident of county—May claim in only one county 100
Veterans—Exemptions under General Acts 1945, p. 570, as amended—Probate judge determines value of property 100
Veterans—Exemptions under General Acts 1945, p. 570, as amended—Determination of net income 100
Veterans—Exemptions under General Acts 1945, p. 570, as amended—If exempt on October 1, exempt for entire year 162

—M—

MADISON COUNTY:
Special school tax for Huntsville—Must be calculated separately from regular city tax 15

MERIT SYSTEM:
Montgomery County and City—1949 Act supersedes all former provisions with reference to employees not exempt 5

MOBILE COUNTY:
Tax collector—No authority to close office all day Saturday 43

INDEX
(Continued)

Page

MONTGOMERY COUNTY:

Merit System—1949 Act supersedes all former provisions with reference to county employees not exempted 5
Tax assessor—1949 Merit System Act applies to certain employees in office of 5

MUNICIPALITIES:

City board of education—Population by 1950 census under 2500—City may not extend limits to increase to 2500 55
Candidate for mayor, councilman or city commissioner—Must be qualified elector 126
Financial institutions tax—City incorporated prior to September 1—Entitled to distribution of 71
Hospitals—Special county tax under Amendment 72—Appropriation to city to extend sewer line to hospitals 32
Meat ordinance—City of Montgomery—Does not violate Interstate Commerce Commission 154
Montgomery—1949 Merit System Act supersedes all former provisions with reference to employees not exempted 5
Public improvement assessments under Title 37, Sec. 526 81
Right of way for State highway—Refusal to acquire—Highway Department must acquire—County may not advance cost 120
Right of way for State highway—Must advance cost of damages—Highway Department must reimburse 120
State Insurance Fund—Surplus—May be invested in funds of 20

—N—

NATIONAL BANKS:

Mortgage to—Assigned to third party, not national bank—May be accepted for recording 91

NOTICES:

Tax sale of personal property—Taxpayer not entitled to personal service 26

—O—

OFFICERS AND OFFICES:

Law and Equity Court Cherokee County—Senate approval of appointment of judge not necessary 118
Gravel pit in which member of governing body owns one-half interest—May purchase 165
Tax collectors—Mobile County—No authority to close office all day Saturday 43

INDEX
(Continued)

Page

OILS:
State Oil Board—Under present orders may not issue permit under facts stated 64

OPINIONS OVERRULED, MODIFIED & DISTINGUISHED:
Quarterly Report, Vol. 55, p. 133 51

—P—

POLL TAX:
Exemption on account of disability—Must be claimed annually 126
Person failing to claim disability exemption annually or pay tax—Not qualified elector 126

PRISONS AND PRISONERS:
Feeding—Amount in excess of sixty cents per capita per day—Must be paid by when sheriff on salary basis 59

PUBLIC UTILITIES:
Propane and butane gas dealers—Property not assessable under Title 51, Section 142 152

PUBLIC WELFARE, DEPARTMENT OF:
Checks for public assistance in counties—May be mailed direct from State Department 168
Federal funds—Use to provide equitable distribution of funds to various counties 112
"Funds appropriated" as used in Title 49, Section 59, as amended 147
Program for aid of disabled—State and county departments may engage in 147

—R—

REFUNDS:
Gasoline tax—Farm tractors—Claimant must have user's permit 8

REGISTERS:
Transcript on appeal—Register may agree to preparation by attorneys—Must certify to correctness 63

ROADS AND BRIDGES:
Farm to market—Grade separation—State and county may share in cost of construction—County must maintain 47
Grade separation—County may pay entire cost of construction and maintenance 47

ROAD AND BRIDGE FUND:
Coliseum for agricultural exhibits—Expenditure of special tax authorized by Constitution Section 215 (a) for construction of 35

INDEX
(Continued)

Page

—S—

SALES TAX:
Department of Physical Education and Athletics of University of Alabama—Sales to—Exempt from 93

SCHOOLS:
City board of education—Population by 1950 census under 2500—City may not extend limits to increase to 2500 55
Madison County—Special school tax for Huntsville—Must be calculated separately from regular city tax 15
School census—No authority for county to pay cost for including children not within age group 34
Trustees—County board may revoke appointments previously made 145
Trustees—No specified time for holding election of—Patrons to determine time 145

SHERIFFS:
Feeding prisoners—May be required to make reports to county in reference to 59
Mileage under General Acts 1947, p. 62—May not be paid unless there is a conviction 62
Prisoners—Feeding—Amount in excess of sixty cents per capita per day—County must pay when sheriff on salary basis 59

SOLICITORS:
Deputy solicitor—Calhoun County—Training school—No authority to pay expenses for attending 37

SUNDAY LAWS:
Sale of liquor on Sunday—Not prohibited in private clubs 74

—T—

TAX ASSESSORS:
Commission paid only on taxes actually collected 19
Montgomery County—1949 Merit System Act applies to certain employees in office of 5

TAXATION:
Deed by corporation to Federal Savings & Loan Association conveying property under lease sale contract—Subject to filing tax 40
Department of Physical Education and Athletics of University of Alabama—Exempt from sales and use tax 93
Eagle Lodge—Not exempt from 160
Financial institutions tax—City incorporated prior to September

INDEX
(Continued)

Page

1—Entitled to distribution of 71
Gasoline tax—Farm tractors—Claimant of refund must have user's permit 8
Propane and butane gas dealers—Property not assessable under Title 51, Section 142 152

TAX COLLECTOR:
Attorneys—County may not employ to assist in collection of delinquent taxes on personal property 69
Commissions paid to assessor on taxes not collected—Liable for 19
Madison County—Special school tax for Huntsville—Must be calculated separately from regular city tax 15
Mobile County—No authority to close office all day Saturday 43
Personal property—Sale for delinquent taxes—Notice and levy 26

TAX SALES:
Personal property—Notice and levy 26

TRANSCRIPT:
Appeals—Register may agree to preparation by attorneys—Must certify to correctness 63

TRAVELING EXPENSES:
Legislators—Appropriation for 54

—U—

UNIVERSITY OF ALABAMA:
Department of Physical Education and Athletics—Exempt from sales and use tax 93

USE TAX:
Department of Physical Education and Athletics of University of Alabama—Sales to—Exempt from 93

—V—

VETERANS:
Exemptions under General Acts 1945, p. 570, as amended—Need not be resident of county—May claim in only one county 98
Exemption under General Acts 1945, p. 570, as amended—Computation of 6-year period 100
Exemption under General Acts 1945, p. 570, as amended—Probate judge determines value of property 100
Exemption under General Acts 1945, p. 570, as amended—Determination of net income 100

INDEX
(Continued)

Page

Exemptions from licenses under General Acts 1945, p. 570, as amended—If exempt on October 1, exempt for entire year 162

VOTERS:

Person failing to claim disability exemption annually or pay poll tax—Not qualified elector 126

—W—

WALKER COUNTY:

Contracts—Not made as provided by Local Acts 1935, p. 131—Board of revenue may not legally pay 30

WARRANTS:

County—Gasoline tax—Trustee bank's fee for handling 51

WILCOX COUNTY:

Commissioners—Compensation under Local Acts 1945, p. 110 104

"Little Taft-Hartley Act" General and Local Acts 1949, p. 347—Unconstitutional 17

WORDS AND PHRASES:

"Cow coliseum" a public building 35